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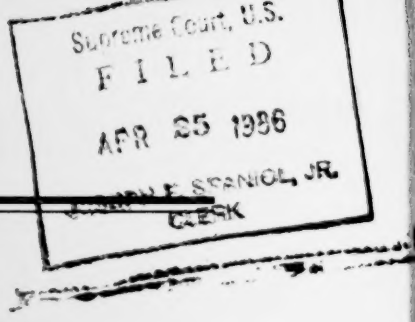

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

S/S SALVADOR, her engines, boilers, etc.,
and A/S Ivarans Rederi,

Petitioners,

—against—

BERISFORD METALS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHESTER D. HOOPER
Counsel of Record
HAIGHT, GARDNER, POOR & HAVENS
1 State Street Plaza
New York, New York 10004
(212) 344-6800

Of Counsel:

CHARLES L. BLACK, JR.
216 Bishop Street
New Haven, Connecticut 06511

QUESTIONS PRESENTED

Whether the Court of Appeals, in setting aside § 1304(5) of the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.*, and thus in holding inapplicable that Section's $500 per package limit of carrier's liability in the case of issuance of an erroneous on-board bill of lading, has given proper interpretation and effect to an Act whose language implements, virtually verbatim, an international convention to which, with many other maritime nations, the United States is a party?

Whether the Court of Appeals erred by depriving a carrier of its package limitation because the carrier inadvertently issued an erroneous on-board bill of lading?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The opinion of the United States District Court for the Southern District is not reported officially but is unofficially reported at 1986 A.M.C. 99. It is reproduced at page 19a of the Appendix. The Second Circuit opinion is reported at 779 F.2d 841, and is reproduced at page 1a of the Appendix. The denial of defendants' petition for rehearing dated January 27, 1986 is not reported, but is reproduced at page 24a of the Appendix.

JURISDICTION

The Second Circuit opinion, of which review is sought, was decided and entered on December 16, 1985. Defendants' petition for rehearing was denied on January 27, 1986. This petition was filed within ninety days of that date, and this court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The federal courts below had jurisdiction of this admiralty cause under 28 U.S.C. §§ 1333 and 1291.

TREATIES AND STATUTES INVOLVED

This case involves the "International Convention for the Unification of Certain Rules Relating to (Ocean) Bills of Lading (The Hague Rules)," June 29, 1937, 51 Stat. 233, T.S. 931, 120 L.N.T.S., reprinted at page 26a of the Appendix, and the United States statute which implements this convention, the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* (1936), reprinted at page 37a of the Appendix.

STATEMENT OF THE CASE

Defendants' agent in Santos, Brazil received 100 bundles of tin ingots for carriage to the Port of New York. Defendants' agent loaded the bundles of tin ingots into four ocean containers as permitted by the bill of lading, and locked and sealed the containers. Defendants' agent transported the containers, which behaved as if they were loaded, not empty, to a Brazilian government controlled storage yard located near the loading dock. The government storage yard issued weight receipts which indicated that the correct cargo was in the containers. Approximately 24 hours after delivery to the government yard, the containers were loaded on board the vessel SALVADOR, and defendants' agent issued an on board bill of lading. When the vessel discharged the containers in New York, two of the four containers were found to be empty. Seventy bundles were

missing and were probably removed from the containers while the loaded, locked and sealed containers were stored for 24 hours in the government storage yard.

The district court awarded summary judgment to plaintiff, but limited defendants' liability to $500 per package, or $35,000, pursuant to the United States Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1304(5). The Court of Appeals for the Second Circuit reversed the district court on the limitation issue, and remanded for entry of unlimited damages, $483,214.90.

Petitioners do not contest the liability issue on this appeal; they raise the limitation issue only.

I. THE COURT BELOW ERRED IN DENYING EFFECT TO THE MONETARY LIMITATION ON DAMAGES SET BY A STATUTE (The Carriage of Goods by Sea Act)[1] THAT IMPLEMENTS VERBATIM AN INTERNATIONAL AGREEMENT.

All the defects of the judgment below stem from one radical error: The Court of Appeals failed to give effect to the plain meaning of treaty[2] language (repeated verbatim in "COGSA") that fixed a monetary limit per package on carriers' liability. Where many nations, with many differing legal concepts and methods, seek world-wide uniformity in some part of law, *by and only by* agreeing on a *text*, then faithful adherence by national courts to the plain meaning of that text is the *only* way to approximate this desired uniformity.[3] Displacement of

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1 46 U.S.C §§ 1300, *et seq.*, hereinafter "COGSA."

2 "Treaty" herein refers generically to all international compacts. The treaty underlying COGSA is called the "International Convention For The *Unification* of Certain Rules of Law Relating to (Ocean) Bills of Lading" (Emphasis supplied). The United States ratified this 1924 Convention on June 29, 1937.

3 The circuit courts of the United States have not even agreed on the meaning of COGSA. For a discussion of inter-circuit conflict, see page

such textual language (as here) by forum-devised doctrines practically contradictory to the agreed text—doctrines devised for dealing with domestic law only, as to which no purpose of international uniformity exists—puts at high risk the uniformity sought by the signatories. These considerations ought to generate a principle of construction: Where the words of COGSA, in themselves, have an intelligible meaning, the rule stated by that meaning should be adhered to.

This Court has laid down a general rule of treaty construction:

> This court is bound to give effect to the stipulation of the treaty, in the manner and to the extent which the parties have declared and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation upon any notion of equity or general convenience or substantial justice.

Amiable Isabella, 19 U.S. 1, 32-33 (1821).

Similarly, the Ninth Circuit has stated:

> We are constrained to look within the four corners of the Treaty keeping in mind the purpose of the contracting parties. Any resort to domestic law must be derived from the express terms of the Treaty itself.

American Trust Co. v. Smyth, 347 F.2d 249, 153 (9th Cir. 1957).

These and many similar expressions apply with fullest strength to treaty language that is to become part of the private law of the signatory countries; the desired uniformity of expectation and of result as to certain private-law matters cannot be had when the treaty language is displaced or disregarded.

11, *infra*. In fact, as of March 19, 1986, there appears to be a conflict within the Second Circuit Court of Appeals with reference to unreasonable deviation. See *infra* at 15-16.

In a thorough article, R.J.C. Munday, *The Uniform Interpretation of International Conventions*, 27 International and Comparative Law Quarterly 450 (1978), the author concludes:

> The more closely courts adhere to the ordinary and natural meaning of the words of the agreed text, the less opportunity there will be for wide divergences in their construction at home and abroad.

Id. at 458.

The present case concerns nothing but a typical contract for the carriage of goods. COGSA provides:

> Neither the carrier nor the ship shall in *any event be or become liable for any loss or damage to or in connection with the transportation of goods* in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, *unless* the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

46 U.S.C. § 1304(5) (emphasis supplied).

In the face of this language, sweeping and clear, the court below has treated COGSA § 1304(5) as "ousted", and ordered a judgment for some fifteen times the package limitation.

This paradoxical decision caps a long development having two related aspects: First, literal geographical "deviation" was held to "oust" limitation of liability. Secondly, various faults of the carrier were held to be so similar to literal "deviation" that this effect of "deviation" should be attached to them, whether under the name of "quasi-deviation" or under some other name of identical effect. *Both* these developments were of dubious rightness before COGSA. *Each* of them is wrong under COGSA. *Neither* of them has been approved by this Court since COGSA came into force in 1936.

Earlier cases, before or under the Harter Act, 46 U.S.C. §§ 190-196, *and thus before COGSA*, held that "deviation"—literal geographical departure from the contracted voyage—"ousted" the contract of carriage, including any contracted-for limitation of recoverable amount. It was sometimes said that the deviating carrier became an "insurer" of the cargo. By 1936, when COGSA superseded the Harter Act in foreign trade, a treaty and statute, not just a private contract, limited the recoverable amount "in any event." The pre-COGSA deviation rule, even as to literal geographic deviation, was probably not justifiable anymore, because its only reasonable support was the fact that, in earlier times, cargo lost its own insurance when the ship deviated from the contracted voyage. With the coming of "held-covered" clauses in cargo insurance policies, this result no longer ensued on deviation.[4] However that may be, this problem should have been treated as very different under COGSA, with its internationally agreed-on text fixing all the principal liabilities of ship and cargo.

Yet, especially in the Second Circuit, the imperatives of construing and honoring such a text were not realized. An early COGSA case, *Jones v. The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953), though a district court decision, has been most influential. The court there held that deviation was to have the *same* drastic effect as *before* COGSA, on the ground that the language of COGSA was not clear or emphatic enough to lead to the conclusion that "Congress" had "intended" to change that law. But that was not only the wrong answer; it was an answer to the wrong question. It must be wrong to ask whether a text, meant to produce uniformity of outcome in the courts of Japan, Argentina, Sweden, and the United States,

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[4] It is extremely ironic that a rule concerning *real* deviation, a rule that in its own narrow terms has thus had its rational foundation eroded by expanded cargo insurance coverage, should form the basis for *analogic* reasoning that creates an open class of "quasi-deviational" faults that "oust", not the "contract" now, but a *statute* and its underlying *treaty*; yet that is what has happened, in this case and in those immediately ancestral to it. See *infra*, p. 11.

sufficiently evidences an *"intent" of the American Congress* to change some feature of the prior *United States* law. The question should rather have been, and should still be, "What is the most *natural* way (without any presumptions favoring antecedent peculiarities of the legal system either of the United States or of any other country) to take this *treaty* language, addressed as it is to *all* courts in the maritime world?" Yet *Jones v. The Flying Clipper* is still of power in the Second Circuit;[5] it is cited twice, in very important places, in the opinion in this very case. *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841, 847, 848, Appendix 1a, 15a, 17a (2d Cir. 1985).

But if one freshly approaches COGSA, holding in mind the *international origin and goal* of its text, how can one conclude that COGSA leaves standing a rule that the package limitation is lost by deviation? The language of § 1304(5), quoted *supra*, must have been written with the very thought in mind of answering negatively all such questions as this. Section 1304(5) declares the $500 package limitation applicable *"in any event,"* and goes beyond literal "loss or damage" *to* the goods, to sweep in, by a more general phrase, "loss or damage . . . *in connection with the transportation of* the goods". There is no way that the facts of the present case can be seen as outside the coverage of that phrase. The shipper is given a clear chance of providing for a greater recovery, by declaring the value of the goods before their delivery to the carrier, and by insertion of this value in the bill of lading—with the consequence that a higher freight will probably have to be paid. Tellingly, COGSA § 1304(5), which lays out the per-package limitation, *immediately follows* § 1304(4), which defines and deals with the *substance of deviation*; how could this collocation have occurred, and been read over time and again in the drafting process, if the words "in any event", § 1304(5) *supra*, were thought not to apply "in the event" of deviation?

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5 It was followed substantially in *Encyclopedia Brittanica v. Hong Kong Producer*, 422 F.2d 7, 18 (2d Cir. 1969). As to conflict among Circuits, see discussion at p. 11-12, *infra*.

Blending with and supplementing the theory that literal geographic deviation "ousts" the exceptions and the monetary limitation normally applicable, there has gradually been confirmed and expanded (not without hesitations) a doctrine at odds with obvious etymology, and with not much support besides ingenious use of metaphor, that says that certain kinds of carrier misconduct are so "fundamental" as to amount to "deviation", or to something enough like deviation to be given the drastic effect of real deviation—that is to say, "ouster" of the contract, or even, as in this case, of a *statute* and of a *treaty*. It is handy to call this doctrine "quasi-deviation" (a term that figures several times in the opinion of the court below in this case). But what is essential is that, whether this not-really-deviational conduct is called "deviation", or "quasi-deviation", or "fundamental breach", or even whether a new terminology of "warranty" is adopted, as in the opinion below in this case,[6] it is all one thing: Certain conduct is picked out as so serious a breach of carrier's obligation as to "oust" not just a *contract* anymore, but, under COGSA, a *statute* as well, and with it a *treaty*. That is a lot of "ouster".

This doctrine (or set of identically operative doctrines) originated in connection with on-deck stowage of cargo, and has radiated out from this center, as in this case. It was not and is not obvious that deck stowage (or any later-devised "quasi-deviations"), should be separated from all other faults for especially drastic treatment. Some of the principal maritime nations do not have such a doctrine. But at all events the picture should have changed under COGSA; the new position should have been seen as ruled by COGSA's text naturally interpreted, rather than by addressing that text with the question whether it showed with strongest clarity the "intent" of the *American* Congress to change the earlier *American* law. COGSA, so naturally interpreted, allows no room for equating one or more nondeviating actions—deck stowage or anything

6 The court below recognizes the possibility of these terminological variations, treating them as what they are—merely different ways of saying the same thing. 779 F.2d at 846, Appendix at 20a.

else—with deviation itself. COGSA covers deviation in these words:

> Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *provided however*, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, be regarded as unreasonable.

46 U.S.C. § 1304(4)

This section seems to be referring to geographical "deviation"; it is hard to imagine deck stowage (for example) as being instrumental to saving life or property, or to loading or unloading cargo or passengers; it is obvious that real deviation was at the focus.[7] If draftsmen had wanted radically to extend the scope of "deviation", this would have been the point at which to say so. This very silence of COGSA is strongly persuasive; it is to the last degree unlikely that so symmetrical and carefully wrought a consolidation of goods-carriage law would not have spelled out so drastic a rule as the one applied in this and similar cases, if the draftsmen had intended that such a doctrine was to play a part in the COGSA regime. Of

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7 Very significantly, the "official" text, in French, underlying COGSA, has "deroutement" for "deviation." No wonder France seems to have no doctrine of "quasi-deviation". This official text is available for resolving any ambiguities. See *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.*, [1954] 1 Lloyd's L.R. 321, 330. Under the German law, it appears that the liability of the carrier is strictly limited in cases of unjustifiable deviation or any breach of contract, and even of gross negligence, to a fixed sum per package (approximately the equivalent of $500). Prüssman-Rabe, Seehandelsrecht §§ 636a and 660 (2d ed. 1983); Schaps-Abraham, Das Seerecht in der Bundesrepublik Deutschland § 636a, No. 10 (4th ed. 1978); Hanseatisches OLG Hamburg, 230/56 (July 1, 1958), Monatasschrift für Deutsches Recht 923 (1958). It is to be noted that the German rule makes it unimportant whether a doctrine of quasi-deviation, or its equivalent, exists, since the package limitation applies anyway.

these "quasi-deviational" holdings (the present case, in all effect, being one), a modern treatise says, "It would seem unwise to extend analogically and by way of metaphor a doctrine of doubtful justice under modern conditions, of questionable status under COGSA, and of highly penal effect." Gilmore and Black, *The Law of Admiralty*, § 3-42, p. 183 (2d ed. 1975).

As to the "ousting" of the COGSA *monetary limitation*, either by real "deviation" or by "quasi-deviation", or by an absolutely equivalent doctrine under another name, one must spotlight a *specific radical contrast* between the earlier Harter Act and COGSA. The Harter Act contained no monetary limitation; no statute, not even a domestic statute, was being "ousted" when the *contractual* monetary limit was set aside. Thus the peculiar concept of the "ouster" of a statute (and therewith of a treaty) played no part while the Harter Act governed. One might approve (*under the law of the United States only*) of the breaking, on certain happenings, of a limitation the carrier had devised and imposed in a contract of adhesion, without coming near to agreeing that a limit *imposed by statutory law, obedient to a treaty*, could be similarly "ousted". See Gilmore and Black, § 3-41, p. 180 (2d ed. 1975).

It is thus precisely symptomatic of the root trouble in this case that the court below relied heavily, even centrally, on its own 1931 decision in *Olivier Straw Goods Corporation v. Osaka Shoshen Kaisha*, 47 F.2d 878 (2d Cir. 1931), *cert. denied*, 283 U.S. 856 (1931), calling that case "remarkably similar to the present one", *Berisford Metals*, 779 F.2d at 845, Appendix at 10a. In truth, that case was markedly dissimilar to this, even on its own facts and equities; when the carrier's people, in *Olivier*, issued an on-board bill of lading, the ship had not even arrived in the named port of loading. This fact was plainly known to the carrier as a corporation, and to its people in the port who issued the false bill. *Olivier*, then, had to do with a fully knowing misrepresentation; our case involves nothing but an unfortunate error. The difference between the two cases is the difference between a lie and a mistake.

But the far more fundamental difference, with wide implications that mark this case as one this Court should consider, is that *Olivier* was decided (whether correctly or not) *in the time of the Harter Act*, five years before COGSA, implementing a treaty, took effect. No international uniformity problem was involved. *The very fact that the court below could, with no visible difficulty, cite Olivier as governing this case, both as to law and as to policy, 779 F.2d at 846, Appendix at 13a, shows that the international uniformity problem is not even being faced.* This lack marks this case not simply as one erroneously interpreting the Carriage of Goods by Sea Act, but as a decision based on the most fundamental error as to the proper *mode* of interpreting a multinational agreement fixing private commercial law. There cannot be a more suitable occasion for the grant of the writ prayed for herein.

This would be true even if there were no inter-circuit conflict. But there is sharp conflict with a Seventh Circuit holding, in *Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt*, 1963 A.M.C. 665, 313 F.2d 872 (7th Cir. 1963), that even real "deviation" does not wipe out the COGSA § 1304(5) $500 limitation. This holding has been approved and followed in a district court in at least one other Circuit, *Krupp International Inc. v. Federal Atlantic Lake Lines*, 1982 A.M.C. 1799 (E.D. Mich. 1981) (not officially reported), and has even been followed by a Canadian court in search of United States law. *Drew Brown, Ltd. v. Orient Trader*, [1972] 1 Lloyd's L.R. 35 (Can. Ex.), *aff'd*, [1973] 2 Lloyd's L.R. 174 (Can.). The Second Circuit Court of Appeals has, of course, held otherwise, *Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), *but cf. B.M.A. Industries. Ltd. v. Nigerian Star Line, Ltd.*, Nos. 85-7684, 7922, slip op. at 2259, 2264 (2d Cir. March 19, 1986), as has the Fifth Circuit, *Spartus Corp. v. S/S Yafo*, 590 F.2d 1310 (5th Cir. 1979). This conflict is on a matter of great concern both to ship and to cargo interests, especially in foreign trade, as to which even inter-circuit, and intra-circuit, uniformity is vital.

II. THERE ARE IN THIS CASE, AND IN OTHERS LIKE IT, NO EXTRAORDINARY EQUITIES THAT MIGHT OVERRIDE THE FOREGOING INTERNATIONAL CONSIDERATIONS.

Petitioner concedes that the rule of construction it has put forward, as proper for interpreting internationally negotiated texts of multinational application, might have to yield to a showing of actual gross fraud, or of other conduct so shocking as to create equities that would be determinative in the courts of all civilized countries.[8] But nothing of that sort is implicated in this case.

Reliance

The Court of Appeals bases its judgment on the equity of reliance. But "reliance" here cuts both ways. Petitioner agrees with the statement by the Court of Appeals, 779 F.2d 841, 845, Appendix at 9a-10a, that the negotiable bill of lading is a "fundamental and vital pillar of international trade and commerce . . .", that the bill ". . . has become so universal and necessary a factor in mercantile credits that the law should make good what the bill of lading holds out", and that "the goods are locked up in the bill." But the bill of lading in this case quite surely "held out" that $500 per package was to be the measure of the carrier's liability. The goods were "locked up" in a bill that readably recited this limit as its most

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8 For instance, under Section 28 of the French "Law Concerning Contracts of Affreightment and Maritime Carriage", which implements the treaty here, see p. 3, n.1, *supra*, and is the French equivalent of the United States COGSA, the package limitation is available to the carrier where the shipper has not declared a higher value except in the case of carrier fraud or dol. Statute No. 66-420 of June 18, 1966. *See* Tetley, *Marine Cargo Claims*, 360, 603-610 (2d ed. 1978); Chauveau, *Traite de droit maritime*, § 813 (Paris 1958). Professor Erling Selvig of the Institute of Maritime Law, University of Oslo, explained that the Scandinavian countries will disregard the package limitation ". . . in cases of *intentional* misconduct *by the carrier himself*." Selvig, Unit Limitation of Carrier's Liability: The Hague Rules Art. IV(5), 5 Archiv for Sjørett 106, 137 (emphasis supplied).

important term—the most important, to both parties, by a factor of about 15 to one (see *supra*, pp. 2-3). The breaking of that limitation, in a few odd cases, can in no way contribute to "confidence" in the bill.

On the other side, there is the solid point that "confidence" is as important to carrier as it is to shipper. A quite recent Fifth Circuit case explains why:

> This position [that the concept of quasi-deviation should not be expanded to encompass unexplained non-delivery] also appears most reasonable as a matter of business practice. Section 4(5) of COGSA gives the shipper two options: to declare the full value of the cargo, obtaining full coverage from the carrier at the cost of higher rates, or to obtain lower rates by leaving the value undeclared and self-insuring for any value above $500. The shipper obviously has the best knowledge of the value of the cargo, and is in the best position to determine which of the two options would be most efficient from an economic standpoint. *In addition, the section 4(5) limitation serves an important function in allowing the carrier to evaluate his potential liability and make proper provision. See Insurance Co. of North America v. S/S AMERICAN ARGOSY*, 732 F.2d 299, 304 (2d Cir. 1984). We are reluctant to tamper with this function without some compelling reason.

C.A. Articulos Nacionales de Goma v. M/V ARAGUA, 756 F.2d 1156, 1161 (5th Cir. 1985) (emphasis supplied).

The holding in the present case even cuts athwart the Second Circuit's own words in S/S AMERICAN ARGOSY, uttered in 1984, and cited *supra* in the Fifth Circuit opinion:

> The district court's decision[9] would also threaten the role of the bill of lading as *an effective means for carriers*

9 That the vessel was liable *in rem* for cargo damage under an unauthorized bill of lading issued by a Non-Vessel Operating Common Carrier, under the theory that the vessel ratified the bill of lading by sailing with the cargo on board.

> *to limit their liability.* Under the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5), the carrier's liability is limited to $500 per package "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." Moreover, the bill of lading constitutes prima facie evidence of a cargo's value, thereby preserving the carrier's ability to appraise its potential liability and to obtain insurance.

732 F.2d 299, 304 (2d Cir. 1984) (emphasis supplied).

It is simply mysterious that these considerations (so recently formulated by itself) did not move the same Court of Appeals in our case to protect *the very reliance interest* so clearly discerned.

It is the consignee, not the carrier, who is here seeking escape from the consequences of the shipper's actual choice—statutory limit and minimum freight. One might ask why this choice has not estopped the shipper, and his successor in interest, from claiming a higher value than the statutory value, the shipper's choice for which was clearly the inducement for the low freight.

Disproportionality

There is no equity, but rather gross disproportionality, in treating the SALVADOR's fault—erroneous issuance of a shipped bill of lading—in so drastic, even penal, a manner as is done in this case. The Second Circuit Court of Appeals has held that very gross negligence *as to furnishing an obviously unseaworthy ship* is no basis for breaching the $500 limit. *Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhauser,* 507 F.2d 68 (2d Cir. 1974). Yet the effect of such negligence can be, and often is, the total or near-total loss of cargo—and the fault is at least as flagrant as in this case. Negligent nondelivery, misdelivery and short delivery are exactly similar in effect to the facts in this case. The goods are just not there. Yet the Second Circuit Court has turned away the attempt to break

the $500 limit in such cases. It seems that even an intentional misdelivery of goods, *Internat. Paper Co. v. Malaysia Oversea Lines*, 1976 A.M.C. 143, 144-145 (S.D.N.Y. 1975) (not officially reported) or damage from a fire wherein the owner is held liable, *The Edmund Fanning*, 291 F.2d 281 (2d Cir. 1953), would be limitable to $500. (And see *B.M.A. Industries*, slip op. decided March 1986, *infra* at pp. 15-16, refusing to break the $500 limit in a case of possibly criminal misdelivery.)

Why should the breach of duty in this case be more like "deviation" (or more suitable for the discernment of a "warranty" that is just another name for the same thing) than another breach that has the same or even a worse effect, and is equally a fault?

Certain language in the 1974 *Iligan* opinion must be pondered:

> We think the principle of "quasi-deviation" is not one to be extended. As previously noted even the holding that a deviation in the geographical sense voids limitations on the carrier's liability seems inconsistent with the language of COGSA.

Iligan, 507 F.2d at 72.

In 1974, the Second Circuit Court thus set its face against further extension of the "principle" of "quasi-deviation". But the present case is nothing but such an extension, with, at most, a change of name. The *Iligan* opinion, moreover, says that *even the voiding of the limitation by real deviation* (on which has been erected the whole superstructure of "quasi-deviation" and its equivalents) "*seems inconsistent with the language of COGSA*." Indeed it does.

Puzzlement deepens when one notes that on March 19, 1986, the Second Circuit held that misdelivery of an entire cargo, in violation of directions in the bill of lading, and even if procured by bribery, was compensable by the carrier only up to the COGSA $500 limit per package. *B.M.A. Industries, Ltd. v. Nigerian Star Line, Ltd.*, Nos. 85-7864, 7922, slip op. at 2259,

2264 (2d Cir. March 19, 1986). Said the court, "The principle of quasi-deviation is arguably inconsistent with COGSA, and is 'not one to be extended' " (citing *Iligan*, but not citing the present case).

From all this it becomes very clear that this subject—*not having been dealt with by this Court at all under COGSA*—badly needs this Court's attention.

III. THE OPINION BELOW WILL SERIOUSLY HARM THE UNITED STATES' ABILITY TO DEVELOP AN EFFICIENT MULTIMODAL TRANSPORTATION SYSTEM AND WILL PLACE CARRIERS CALLING AT UNITED STATES PORTS AT A COMPETITIVE DISADVANTAGE.

The anomaly created by the Second Circuit's disproportionate emphasis of the quantity of cargo received over the condition of cargo received, and over most other aspects of the bill of lading, will seriously harm the United States' ability to develop an efficient multimodal transportation system. It may very well deprive the United States of advantages other maritime nations are reaping from the ocean container.

The opinion below states that carriers will be deemed to have *guaranteed* receipt of the quantity, but not the condition, of cargo described in the bill of lading. The opinion indicates that the guaranty will apply even to cargo received by the carrier in locked and sealed ocean containers. This ruling will seriously hamper, if not totally prevent, the United States transportation industry from taking full advantage of the ocean container and a multimodal transportation system.

It will require all carriers to discharge, tally and reload all containers on receipt, or to install scales on every container pier in the world to weigh containers immediately before loading.

The ocean container, coupled with double stack railroad equipment, is just now starting to provide United States

railroads with the opportunity to carry substantial quantities of ocean cargo.[10] It is doubtful that United States railroads could take advantage of this opportunity if they were required to open and tally the contents of every container they received, or if they were required to weigh every container before loading it onto their rail equipment.

The ocean container also provides United States exporters of cargo with advantages that will be taken away by the Second Circuit's opinion in this case. The ocean container offers the physical possibility to the manufacturer of a product, far from any ocean, of loading the product into an ocean container, and securing it within the container according to the peculiarities of the product. The manufacturer can lock and seal the container to assure that his product will not be touched or tampered with until it reaches its final destination.[11]

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10 For discussions of double stack container trains' use of ocean containers and the effect of the ocean container and the double stack container train on multimodal transportation in the United States, see Field, *Landbridge Versus All-Water Struggle Debated at Seatrade Intermodal Panel*, Vol. 204, No. 13, Traffic World, 19 (Dec. 23, 1985); Down and Wise, *The Intermodal Challenge*, Vol. 205, No. 11, Traffic World, 30 (Mar. 17, 1986); DeBaer, *The Stack Car Revolution*, *id.* at 54; and Mahoney, *Intermodal Goal; Trim Time and Cost at Point of Interchange*, *id.* at 57.

11 A study by the International Chamber of Commerce, *The Development of International Container Transport: Its Application in Developing Countries*, 6-7 (Int'l Chamber Commerce 1977), has listed the following as advantages of the ocean container:

(a) *Faster transit time*, caused not by faster, more expensive ships, but by a reduction of in port time by smoothness in handling cargo on and off ships, which has reduced port congestion and delay.

(b) *Protection of cargo* because containers protect cargo against physical damage and permit shippers to use lighter and cheaper packaging. Containers also reduce the number of occasions during which the cargo is handled, thus reducing the chance of damage and pilferage.

The extra handling encouraged by the opinion below would, of course, destroy these advantages. *See also* Note, *Containerization and Intermodal Service in Ocean Shipping*, 21 Stan. L. Rev. 1077 (1969).

According to the opinion below, ocean carriers will, at the very least, have to install container scales on all container piers throughout the world and/or will have to break the seal on each container, open the container, discharge its contents and tally its contents. Securing peculiar to the product might not be duplicated after the product is returned to the container, or the product might be damaged and/or pilfered during the process. Certainly, the cargo would be delayed. By overemphasizing the receipt aspect of the bill of lading, its contract aspect is seriously harmed.

The opinion will also hamper the present relay system, which promotes efficient transportation. This system allows cargo, remaining in a locked and sealed container, to be transferred from ship to ship at various relay points to provide a speedy and efficient method of transportation. *Parnass International Trade & Oil v. Sea-Land Service*, 595 F. Supp. 153 (S.D.N.Y. 1984). If cargo were transferred between carriers at the various relay points, the Second Circuit opinion in this case, together with the last "carrier doctrine"[12] expressed in *Madow v. Liberty Exporter*, 569 F.2d 1183 (2d Cir. 1978), would make each carrier in the chain a guarantor of the bill of lading quantity description and would force each carrier in the chain to discharge and tally each container's contents or to weigh each and every container before it was loaded or received by each and every carrier.

If carriers, realizing the impracticability of the opinion below, decide to continue business as is for the sake of the efficiency of the transportation system, and not to empty and tally or to weigh containers at the various transfer terminals, the carriers would, of course, assume greater risks. The carriers would undoubtedly pay higher insurance rates for the greater risks and would pass those rates on to cargo interests in

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12 The last carrier doctrine places upon the last carrier, in a chain of successive carriers, liability for damage or loss unless the last carrier can prove that it was not negligent or that it is protected by one of the COGSA exceptions from liability. *Madow*, 569 F.2d at 1185.

the form of higher freight rates, which would, in the final analysis, be paid by the consumer.

Even if each carrier did tally each and every container's contents on receipt, common sense tells us that the carrier's insurance rates would not decrease. The greater handling during emptying and loading containers would increase the risk of physical damage, and weighing containers would delay their transportation and advertise their contents to many people on the docks, thus inviting theft. The uncertainty left by this opinion would prevent both the vessels' and cargoes' underwriters from predicting whether the COGSA limitation would apply. Shippers of cargo would not be able to assure their underwriters that they would be fortunate enough to deal with carriers who mistakenly issue on-board bills of lading for cargo not loaded on board. The resultant uncertainty would probably raise, not lower, both cargoes' and vessels' insurance premiums.

The problems created by the Second Circuit opinion in this case surely run counter to the intent of the Interstate Commerce Commission cited by this Court: "It is our purpose and our hope to encourage the growth of this [multimodal] transportation phenomenon." *American Trucking v. A.T. & S.F.R. Co.*, 387 U.S. 397, 405 (1967). The problems also run counter to the "Congressional purpose to foster an efficient and fair national transportation system." *United States v. Pennsylvania R. Co.*, 323 U.S. 612, 616 (1945).

The unfortunate and detrimental effects of this opinion must have been reached, not with the original purpose of the doctrine of unreasonable deviation or with all functions of a bill of lading in mind. It must have been reached by following a misguided tangent of reasoning to the tangent's logical conclusion. That tangent was based on two unsound foundations, application of a theory referred to as "quasi-deviation", "fundamental breach", or "warranty," in violation of the plain meaning of COGSA, and overemphasis of the quantity receipt aspect of the bill of lading in derogation of its contract aspect.

This overemphasis will hold carriers accountable, without the benefit of any defense, for quantities of cargoes, described in bills of lading to be within locked and sealed containers, although the practicalities of modern, multimodal shipping do not permit carriers to verify the quantity accurately. The tallying and weighing required by the opinion below will delay the delivery of cargo and will increase the risk of damage to the cargo, thus hampering the carrier's ability to perform the contract aspect of the bill of lading. Carriers will, however, be able to limit their liability if they are grossly negligent or if an employee criminally misdelivers as long as they have counted or weighed the cargo properly when each carrier receives the cargo.

The issue of a carrier's duty to verify the contents of containers was first broached in the bulk cargo case, *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628 (9th Cir. 1974) but the tangent did not start with that case. *Portland Fish* specifically refused to consider the effect of its ruling on containers. *Portland Fish* had estopped an ocean carrier from denying that it had received the weight of a bulk cargo of fish, which had been described in the bill of lading it issued. The *Portland Fish* court reasoned that, if a carrier had reasonable grounds to suspect that the bill of lading did not accurately describe the goods, marks, number, quantity, or weight, or if the carrier had no reasonable means of checking that information, the carrier was not bound to issue a bill of lading containing such a description, *Id.* at 633. Thus, if a carrier did harbor such suspicions, or had no reasonable means of checking the description, the carrier would be estopped from denying the bill of lading description vis-a-vis a person who had relied on them. *Id.*

This decision specifically avoided the use of dictum which could have been construed to apply the estoppel theory to containerized cargo. Ocean carriers feared that the estoppel theory might someday be extended from bulk cargo to containers and requested leave to file amicus curiae briefs for rehearing. The court found rehearing unnecessary:

> On rehearing, several ocean carriers have moved for leave to file briefs amicus curiae. However, it appears that the issues sought to be raised in such briefs concern the possible effect of our decision on the ocean transportation of containerized cargoes—those in sealed "packages" not normally opened and inspected by the carrier at the time he issues a bill of lading. The motions are denied. Since the case before us involves solely a bulk shipment subject to piece count, the questions thus raised will have to wait another day for decision. We intimate no opinion on them.

Id. 510 F.2d at 634 (9th Cir. 1974).

The courts did not take long to reach the container questions, and the tangent began by ignoring the "shipper's load and count" or "said to contain" clause on bills of lading. Once reached, the court in one decision, *Baby Togs Inc. v. S.S. AMERICAN WING*, 1975 A.M.C. 2012 (S.D.N.Y. 1975) (not officially reported), merely treated the bill of lading quantity description as *prima facie* proof. It did not estop the carrier from proving that it had not, in fact, received the quantity described in the bill of lading, and certainly did not hold the carrier to have *warranted* receipt of the quantity described by the bill of lading. The language emphasized below presumes that the carrier could rebut the bill of lading description:

> Defendant carrier contends that plaintiff has failed to prove the contents of the container and their condition at the time of delivery to defendant. In so doing, it relies upon the statements "Shipper's Load & Count" and "Said to Contain" appearing on the dock receipt and on the clean bills of lading which defendant issued. However, the bills of lading herein also list the number of cartons of infants' wear, their cubic measurement, and their weight, although under 46 U.S. Code, Sec. 1303(3)(c), the carrier may omit such information from the bill of lading if it has reasonable grounds for suspecting, or no reasonable means of checking, the accuracy of any marks, number,

> quantity or weight. *Spanish-American Skin Company v. Ferngulf*, 1956 A.M.C. 2238, 143 F. Supp. 345, 350 (S.D.N.Y. 1956), *aff'd*, 1957 A.M.C. 611, 242 F.2d 551 (2d Cir. 1957). Accordingly, the recitation of the number, weight and measurement in the bills of lading established *prima facie* receipt by the carrier of the number, weight and measurement recited, regardless of the above quoted statements appearing on those documents.
>
> *This prima facie proof has not been effectively rebutted by competent evidence.*

Id. 1975 A.M.C. at 2018 (emphasis supplied).

Application of even the estoppel theory to the case now before the bar should decide this case correctly. It would hold defendants liable as if the cargo had been loaded on board and would, of course, award plaintiff what plaintiff paid for, a bill of lading which limited the carrier's liability to $500 per package.

In fact, the *Baby Togs* court stated *in dictum* that the package limitation, if relevant, would have been applied. *Id.* at 2022.

The Second Circuit's imposition of insurer liability on S/S SALVADOR seems out of step with even this line of reasoning when it is compared with the more recent Second Circuit opinion in *B.M.A. Industries, Ltd. v. Nigerian Star Line, Ltd.*, Docket Nos. 85-7864, 7922, slip op. 2259 (2d Cir. March 19, 1986), which was discussed, *supra*, at pp. 15-16. It held that even *criminal* misdelivery would not constitute an unreasonable deviation.

The *B.M.A. Industries* rationale is more in line with the clear meaning of COGSA, and with the interpretation of the law governing United States inland transportation. For the sake of predictability and nationwide uniformity, courts permit inland carriers to limit their liability even if they fundamentally breach their contracts of carriage. *Rocky Ford Moving Vans,*

Inc. v. United States, 501 F.2d 1369 (8th Cir. 1974), expressed the rationale as follows:

> . . . [W]e rely primarily upon the policy underlying the Carmack Amendment to the Act to Regulate Commerce, 49 U.S.C. § 20(11).
>
> * * * * *
>
> The Carmack Amendment thus expressly recognizes the right of a shipper and carrier to establish an agreed value of the goods to be shipped which limits the carrier's liability and permits a shipper thereby to benefit from a lower rate. *Strickland Transportation Co. v. United States*, 334 F.2d 172 (5th Cir. 1964). *In adopting the Carmack Amendment, Congress intended to impose a single uniform federal rule upon the obligations of carriers operating in interstate commerce. New York, New Haven & Hartford R.R. Co. v. Nothnagle*, 346 U.S. 128, 73 S.Ct. 986, 97 L.Ed. 1500 (1953); *Atchison, Topeka & Sante Fe Ry. v. Harold*, 241 U.S. 371, 36 S.Ct. 665, 60 L.Ed. 1050 (1916); *Adams Express Co. v. Croninger*, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314 (1913). *Such statutory provisions supercede [sic] "the diverse requirements of state legislation and decisions", Southern Ry. v. Prescott*, 240 U.S. 632, 639-640, 36 S.Ct. 469, 472, 60 L.Ed. 836 (1916), and render invalid all "agreement[s] in derogation of them * * *." *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411, 420, n.9, 79 S.Ct. 1210, 3 L.Ed.2d 1334 (1959).

Rocky Ford, 501 F.2d at 1371, 1372, (emphasis supplied).

The Western District of Oklahoma restated and followed this rationale in *Conoco, Inc. v. Andrews Van Lines, Inc.*, 526 F. Supp. 720 (W.D. Okl. 1981). It too emphasized the importance of the ". . . overriding federal policy of uniformity." *Id.* at 722.

It is curious, to say the least, that the Eighth Circuit and the Western District of Oklahoma so clearly recognize the need for

uniform application of federal transportation law throughout the United States, but the Second Circuit does not recognize the need for the uniform application of a multinational convention throughout the maritime world.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

CHESTER D. HOOPER
Counsel of Record
HAIGHT, GARDNER, POOR & HAVENS
1 State Street Plaza
New York, New York 10004
(212) 344-6800

Of Counsel:

CHARLES L. BLACK, JR.
216 Bishop Street
New Haven, Connecticut 06511

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 91, 195—August 1985 Term

Argued: September 30, 1985

Decided: December 16, 1985

Docket Nos. 85-7401, 85-7429

BERISFORD METALS CORPORATION,

Plaintiff-Appellant-Cross-Appellee,

—against—

S/S SALVADOR, her engines, boilers, etc., and A/S IVARANS REDERI,

Defendants-Appellees, Cross-Appellants.

Before:

FRIENDLY, MANSFIELD and WINTER,

Circuit Judges.

Appeal by plaintiff from an order of the Southern District of New York, Gerard L. Goettel, *Judge*, limiting the liability of the defendant carrier and its ship for loss of cargo to $500 per package under § 4(5) of the Carriage of Goods By Sea Act, 46 U.S.C. § 1304(5). Defendant carrier and its ship cross-appeal from the denial of their request that the action be dismissed.

The order is reversed and the case is remanded with directions to enter judgment for the full amount of plaintiff's loss.

JOHN P. CONROY, Esq., New York, NY (Douglas A. Franklin, Esq., McHugh & O'Conor, New York, NY, of counsel), *for Berisford Metals Corporation.*

CHESTER D. HOOPER, Esq., New York, NY (Ara A. Shimshidian, Esq., Haight, Gardner, Poor & Havens, New York, NY, of counsel), *for S/S Salvador and A/S Ivarans Rederi.*

MANSFIELD, *Circuit Judge*:

Berisford Metals Corporation (Berisford), plaintiff in this cargo-loss action, appeals from an order and judgment of the Southern District of New York, Gerard L. Goettel, Judge, granting its motion for summary judgment against the ship S/S Salvador and A/S Ivarans

Rederi (Ivarans), its owner and operator, for loss of 70 bundles of tin ingots valued at $483,214.90 but applying the limitation of liability provisions of § 4(5) of the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5)[1] (COGSA), to limit the defendants' liability to $500 per bundle, or a total of $35,000. Defendants cross-appeal from the district court's denial of their motion for dismissal of the action. We reverse the judgment to the extent that it limits defendants' liability to $500 per bundle and remand the case with directions to enter judgment in Berisford's favor for the full value of the lost cargo. We affirm the district court's denial of defendants' motion to dismiss the complaint.

The material facts are not in dispute. On June 23, 1983, Berisford contracted to purchase from Paranapanema International Ltd. (Paranapanema), located in Sao Paolo, Brazil, 50 metric tons of grade A tin ingots in bundles at a price of $13,140 per metric ton (a price later changed by the parties to $13,300 per metric ton). The terms were F.O.B. vessel at Santos, Brazil, for shipment to New York in January 1984.[2] Payment was to be made

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1 Section 4(5) of COGSA, 46 U.S.C. § 1304(5) provides:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier."

2 F.O.B. or Free on Board "means that title to property passes from the seller to buyer at the designated FOB point." 10 *Williston on Contracts*, § 1079A, at 94 n.6 (3d ed. 1967). Since the vessel was designated as the FOB point in this case title to the goods was to pass when the goods were loaded on board the ship. *See id.*, § 1080A, at 109-10 (Standard American Foreign Trade Definitions).

net cash 45 days after ocean bill of lading date against presentation of a "full set of shipping documents," which, in conjunction with the F.O.B. vessel term, was understood by the parties as requiring a clean on board bill of lading.

Pursuant to the contract Paranapanema delivered 100 bundles, each containing 30 tin ingots and steel-strapped onto wooden pallets, to Ivarans' agent at Santos, Agencia de Vapores Grieg, S.A. (Grieg), which maintains a terminal located about 5 kilometers from the dock where cargo would be loaded onto Ivarans' ship. Grieg acknowledged receipt of the bundles on December 29, 1983. Grieg stuffed the 100 bundles into four 20-foot containers at its terminal, as follows:

Container No. NICU 901692 35 bundles
Container No. NICU 703002 35 bundles
Container No. IVLU 904540 9 bundles
Container No. IVLU 902420 21 bundles

The containerization was carried out "at ship's convenience", to which Berisford did not object. Clause 6 of the bill of lading later issued by Ivarans authorized the carrier to stow goods "as received or, at Carrier's option, by means of containers or similar articles of transport used to consolidate goods".

After stuffing of each container its doors were closed, locked and sealed. On January 3, 1984, the containers were transported by Grieg to a Brazilian government-controlled storage yard located near the loading dock. Upon delivery of the containers to that yard they appeared, from the sound and handling of the trucks used to transport them, to be loaded, not empty. The government storage yard issued receipts indicating weights approxi-

mately equaling those listed on the shipping documents. At that point the seals and locks appeared unchanged.

On January 4, 1984, the containers were removed from the yard and loaded by stevedores aboard the vessel. On the same date Grieg, acting on behalf of Ivarans and the Master of the S/S Salvador, issued a clean on board bill of lading stating that the ship had received "100 bundles steel strapped on wooden skids containing 3000 refined tin ingots, "Mamore" brand, with a minimum purity of 99.9%". The gross weight was stated on the bill to be "50,647" kilos and the net weight as "49,845" kilos. Par. 3 of the conditions on the back side of the bill of lading provided that the provisions of COGSA would apply throughout "the entire time the goods [would be] in the carrier's custody, including the period of carrier's custody before loading on and after discharge from the ship". The bill further stated that unless a higher value had been declared in writing prior to delivery and inserted in the bill, the $500 limit per package specified by COGSA would govern the carrier's liability. *See* note 1, *supra*.

Upon the loading of the four containers aboard the ship, neither Ivarans nor its agent Grieg verified the contents or made a tally of the 100 bundles represented by the bill of lading to be in the containers. After being loaded aboard the ship, the containers were not shifted from their place of stowage until the ship arrived in New York on January 19, 1984, at the Red Hook Terminal in Brooklyn. There the four containers were discharged on January 20, 1984, and placed on the ground outside Pier 11 to await stripping. On January 24, 1984, Universal Maritime Services, Ivarans' stevedore, opened the four containers by using a bolt cutter or pliers to cut the seals and found that two of them supposed to contain 70

bundles were empty. Before being broken the seals of the containers appeared to be intact, with no evidence of tampering; in fact, the seals were pitted and rusted. Neither the floors of the two containers nor the snow-covered ground around them near Pier 11 revealed any evidence of recent removal of any cargo from the containers. Each bundle would have weighed approximately 1100 lbs.

On January 27, 1984, Berisford wrote U.S. Navigation, Ivarans' New York agent, charging Ivarans with responsibility for the loss of the 70 bundles. On February 7th Mr. K. W. Hansen, a marine surveyor retained by U.S. Navigation to investigate the loss, rendered a written report which stated that in his opinion the "70 missing bundles of tin ingots were never loaded in the two containers."

In the meantime the Mellon Bank in New York, representing Paranapanema, the seller and shipper of the tin ingots, presented to Berisford in accordance with the purchase contract a full set of shipping documents with respect to the 100 bundles of tin ingots purchased by Berisford, including three original on board bills of lading issued by the carrier (Ivarans), Paranapanema's invoice, weight and analysis certificates, and a draft in the amount of $662,938.50, payable 45 days after the bill of lading date. Since the papers were in order and complied with the parties' purchase contract Berisford accepted the draft and on February 17, 1984, paid the full amount of the purchase price to the Mellon Bank as collection agent for Paranapanema. In addition, Berisford paid Ivarans' freight charges amounting to $10,101.67.

On August 31, 1984, Berisford commenced the present action, seeking $525,000 damages for the missing cargo.

Defendants' answer admitted receipt of the shipment of bundles of tin ingots but denied liability, asserting its rights under COGSA and its bill of lading with respect to the shipment, including COGSA's $500 per package limitation on its liability, and alleging that it acted without any fault or neglect. On February 5, 1985, after the parties had conducted pre-trial discovery, including the taking of depositions,[3] Berisford moved for summary judgment, contending that it had paid the purchase price in reliance on Ivarans' representation in its on board bill of lading that the 70 missing bundles had been loaded aboard its ship, that it was committed by its purchase contract to pay the purchase price upon the seller's presentation of the shipping documents, and that the defendant carrier's issuance of a clean on board bill of lading when in fact it had not received the 70 bundles constituted a "quasi-deviation," depriving the carrier of the benefits of the bill of lading, including its per package limitation on liability. Berisford sought damages in the amount of $483,214.90 plus interest.

Ivarans did not seriously question the probability that the loss of the 70 bundles occurred prior to its loading of the containers aboard its ship in Santos. Indeed, the evidence that the two containers had not been opened after loading and prior to their being found empty upon their arrival in New York (while still in Ivarans' custody) was overwhelming. Ivarans offered no evidence to the contrary. Its principal defenses were (1) that it could not be faulted for any pilferage that may have occurred while the goods were in the custody of the Brazilian govern-

[3] The persons deposed included Paul W. Schaldonat, Berisford's Vice President; Ingeman Johansen, captain of the S/S Salvador; and Peter J. Rainone, employee of McRoberts Protective Agency, who was in charge of security at Pier 11, Red Hook Terminal, Brooklyn.

ment-controlled dockside warehouse in Santos since it had no control over that warehouse or the government's longshoremen, (2) that Berisford's loss was not caused by its misdescription of the contents of the containers because Ivarans was not required, under the purchase contract's provision for payment against a "full set of shipping documents," to issue an on board bill of lading, and (3) that in any event defendants' liability was limited to $500 per bundle. In opposing plaintiff's motion the defendants, in an affidavit of their attorney, Chester D. Hooper, asked that the complaint be dismissed or in the alternative that Ivarans' liability be limited to $500 per bundle.

In an oral bench opinion Judge Goettel concluded that an evidentiary hearing was unnecessary since the existing evidence demonstrated that the loss had occurred while the cargo was in the possession of the Brazilian government's stevedores in Santos. He rejected Ivarans' argument that it was not responsible for a loss occurring while the cargo was in the possession of the Brazilian Government. However, he also rejected Berisford's contention that Ivarans' issuance of a false on board bill of lading constituted a "quasi deviation" negating the availability of the COGSA per package limitation on liability. Instead, he held that a carrier is estopped from denying that the goods were loaded only upon a showing that it knew that they had not been loaded. He accordingly granted plaintiff's motion to the extent of awarding it judgment in the sum of $35,000, from which both parties appeal.

DISCUSSION

The central question raised by this appeal is whether a carrier that issues a clean on board bill of lading erroneously stating that certain goods have been received on board when they have not been so loaded should be precluded from limiting its liability pursuant to an agreement binding the parties to the terms of § 4(5) of COGSA, 46 U.S.C. § 1304(5). For the purpose of resolving this issue a brief review of pertinent admiralty law principles is helpful.

As we recently reaffirmed in *Allied Chemical International Corp. v. Companhia de Navegacao Lloyd Brasileiro*, ____ F.2d ___, Oct. 15, 1985, Dkt. No. 85-7103, Slip Op. 6429, 6437-38, a negotiable or order bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involving the sale and transportation of goods between parties located at a distance from one another. It constitutes an acknowledgement by a carrier that it has received the described goods for shipment. It is also a contract of carriage. As a document of title it controls the possession of the goods themselves. *See Gilmore and Black, The Law of Admiralty*, Ch. III, § 3-1, p. 93 (2d ed. 1975). It has been said that the bill and the goods become one and the same, with the goods being "locked up in the bill." *Id.* 96. As the court stated in *Pollard v. Reardon*, 65 F. 848, 852 (1st Cir. 1895),

> "In the developments of commerce and commercial credits the bill of lading has come to represent the property, but with greater facility of negotiation, transfer, and delivery than the property itself. . . . And it has become so universal and necessary a

> factor in mercantile credits that the law should make good what the bill of lading thus holds out. There is every reason found in the law of equitable estoppel and in sound public policy for holding, and no injustice is involved in holding, that, if one of two must suffer, it should be he who voluntarily puts out of his hands an assignable bill of lading, rather than he who innocently advances value thereon."

The necessity for maintaining the integrity of and confidence in bills of lading has been recognized by us in a line of cases beginning before and continuing after the 1936 enactment of COGSA. In *Higgins v. Anglo-Algerian Steamship Co.*, 248 F. 386 (2d Cir. 1918), for instance, after reviewing decisions of English courts on the question we held that a carrier which issued a clean bill of lading falsely representing that it received goods in apparent good order and condition when it knew they were damaged may not take advantage of exceptions and limitations in the bill for its own benefit.

The carrier's responsibility for issuance of false bills of lading was thoroughly considered by this court in *Olivier Straw Goods Corporation v. Osaka Shosen Kaisha*, which was the subject of two appeals over a period of four years, 27 F.2d 129 (2d Cir. 1928) (*Olivier I*), *aff'd after remand*, 47 F.2d 878 (2d Cir.), (*Olivier II*), *cert. denied*, 283 U.S. 856 (1931). In that case, which was remarkably similar to the present one, the shipper delivered 18 cases of hemp to the carrier at its Yokohama dock for shipment by steamer to New York. The carrier issued and delivered to the shipper a bill of lading representing that the cases had been loaded on the ship Alaska Maru when in fact they had not been loaded because that ship had been diverted elsewhere due to an earthquake. The cases of

hemp, which had been placed by the carrier in an unprotected dockside shed, were lost as a result of looting. Relying on the bill of lading and other shipping papers forwarded to it by the shipper, the purchaser's bank accepted and paid the shipper's invoice. The purchaser then sued the carrier for the value of the hemp. In an opinion by Judge Augustus Hand, concurred in by Judges Learned Hand and Swan, the court held the carrier liable for the full value of the goods described in the bill of lading, stating:

> "The bill of lading recited that the goods were shipped in apparent good order and condition. That statement was a warranty that they were so shipped, and the libelant, as indorsee of the bill of lading, acquired the direct obligation of the carrier and with it the right to sue. . . .
>
> "The warranty that the goods were on board was broken by the failure to ship them, and that breach . . . deprived the carrier of the right to invoke the clauses limiting liability. In The Sarnia, 278 F. 459, where the cargo had been improperly stowed on deck, we held that the valuation clauses in the bill of lading did not serve to limit damages. We said, at page 461 of 278 F.: 'The general rule undoubtedly is that, if the shipowner commits a breach of the contract of affreightment which goes to the essence of the contract, he is not entitled after such breach to invoke the provisions of the contract which are in his favor.'
>
> * * * * *
>
> "Certainly a breach like the one here, which arose from a failure to ship the cargo at all, with its

> consequent loss or destruction on land, was no less fundamental than a deviation in the voyage, or than stowage of cargo on deck contrary to agreement, or than misdelivery of goods. In all such circumstances valuation clauses in the bill of lading have been held inoperative to relieve the shipowner. St. Johns N.F. Shipping Corporation v. S.A. Companhia Geral, etc., 263 U.S. 119, 44 S. Ct. 30, 68 L. Ed. 201; The Cabo Villano (C.C.A.) 18 F.(2d) 220; Niles-Bement-Pond Co. v. Dampkiesaktieselskabet Balto (C.C.A.) 282 F.235; The Sarnia (C.C.A.) 278 F. 459." *Olivier II*, *supra*, at 879-80.

Although we have declined to extend full liability in some contexts that have been likened to deviations or "quasi-deviations" in a voyage, *see Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser*, 507 F.2d 68, 71-72 (2d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 19 (2d Cir. 1969) (Hays, J., dissenting), *cert. denied*, 397 U.S. 964 (1970), we have steadfastly adhered to the result reached in *Olivier II* and have cited the case with approval for the proposition that the $500 per package limitation of liability may not be invoked by a carrier that has issued an on board bill of lading erroneously representing that goods were loaded aboard its ship, regardless whether or not the carrier acted fraudulently. *Elgie & Co. v. S.S. "S.A. Nederburg"*, 599 F.2d 1177, 1181 (2d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980). It is true that *Elgie & Co.* involved a shipment from the United States governed by the Pomerene Act, 49 U.S.C. § 81 *et seq.*, which does not contain limitation of liability provisions. However, the court took pains to point out that it did not base its holding on that distinc-

tion but on what it conceived to be "established doctrines of admiralty law", citing *Olivier II*. Similarly we recognized that it was "the common law rule" that such a fundamental misstatement in a bill of lading need not be fraudulent or intentional for liability to ensue. 599 F.2d at 1180.

The *Olivier II* ruling represents just as sound public policy today as it did in 1931. Whether one likens the carrier's issuance of a false bill of lading with respect to its loading of cargo to a "deviation," a "breach of warranty" or a representation which it must be "estopped" to deny, its adverse impact on trade and on reliance on bills as an essential method of facilitating trade is serious. Title to the goods usually passes from the seller to the buyer when the seller delivers the goods to the carrier and the carrier or its agent issues a bill. In the past, on board bills, signifying that the goods had been loaded on board the ship, were generally required. More recently, "received for shipment" bills, which indicate merely that the carrier has received the goods, are sometimes used. *See* 10 *Williston*, *supra*, at § 1078A, pp. 83-87. In this case, an on board bill was clearly required by the parties. When the proper bill issues, the seller then ceases to assume any risk of loss or damage. The carrier, by issuing the bill, enables the seller to collect full payment of the purchase price from the buyer since presentation of the bill to the buyer assures it that the seller has fulfilled its commitment to ship the goods and obligates the buyer to pay for them. Presentation of an on board bill also serves to satisfy the buyer that the goods have not been stolen or lost while in the custody of the carrier prior to loading, an interval during which the seller bears the risk of any loss in any transaction requiring such a

bill. If, instead, the buyer were free to question the accuracy of the bill upon presentation, the entire structure would be weakened as a method of carrying out commercial transactions.

In support of their contention that a carrier may be held liable for a misstatement in its bill of lading only if it acted intentionally or fraudulently, defendants direct our attention to decisions holding that when a carrier issues a bill of lading to the effect that it has received goods in apparent good condition it may not be held liable beyond a per package limitation for damaged goods contained in the bill of lading or COGSA unless it had actual knowledge of the damaged condition at the time of loading or the damage was readily apparent at that time. *See The Carso*, 53 F.2d 374 (2d Cir. 1931); *American Industries Corp. v. M.V. Margarite*, 556 F. Supp. 206, 212-13 (S.D.N.Y. 1981). These "conditions" cases are readily distinguishable from those applying *Olivier II*. The "conditions" cases raise the issue of the extent to which a carrier must inspect the condition of goods made, sold and bought by others. Since the imposition of a duty to make a detailed inspection of the condition of the contents of every package received from others would be excessive, the carrier may be held liable only if it knew or could readily see that the packages were not in good condition. A carrier is not required to open every package received from a shipper and inspect the contents before issuing a bill to the effect that they appear to be in good condition.

When a carrier, on the other hand, makes a representation in a bill of lading with respect to *its own conduct* it is properly held to a higher standard since it is reasonably expected to be aware of *its own actions*, including

whether or not it has loaded cargo, *Olivier II*, *supra*; *Miles Metal Corp. v. M.S. Havjo*, 494 F.2d 563 (2d Cir. 1974), or has loaded the cargo below or above decks. *See St. Johns N.F. Shipping Corporation v. S.A. Companhia Geral*, 263 U.S. 119 (1923); *Encyclopaedia Britannica v. S.S. Hong Kong Producer*, *supra*, at 18; *The Sarnia*, 278 F. 459, 463 (2d Cir. 1921), *cert. denied*, 258 U.S. 625 (1922); *Jones v. The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953). As we stated in *Nichimen Company v. M.V. Farland*, 462 F.2d 319, 330 (2d Cir. 1972), "the duty to load, stow, and discharge cargo—and the consequences for failing to do so properly—fall upon the ship and her owners." 46 U.S.C. § 1303(2) specifically provides, "The carrier shall properly and carefully *load*, handle, stow, carry, keep, care for, and discharge the goods carried." (Emphasis supplied).

Applying the foregoing principles to the present case, we conclude that the defendants must be held responsible for the full value of the lost cargo at the time of shipment in Santos and cannot invoke the $500 per package limitation of liability provision of § 4(5) of COGSA, 46 U.S.C. § 1304(5). The carrier here, having received 100 bundles of tin ingots from the shipper in Santos, issued a false F.O.B. bill of lading with respect to its own conduct, warranting that on January 4, 1984, it had loaded 100 bundles on its ship when in fact it had loaded only 30. The bill of lading, whether or not intentionally false, enabled the shipper to collect from Berisford, the buyer, the full purchase price for 100 bundles. If the carrier had disclosed that 70 bundles had not been loaded, Berisford would have been entitled to refuse payment and the loss would have fallen on the seller of the goods as required by the conditions of the sales contract. The carrier's

misrepresentation therefore amounted to a fundamental breach going to the very essence of its contract and precluding it from invoking those provisions extending the limitation of liability terms of § 4(5) of COGSA to the period when the goods were on shore.

Defendants cannot escape responsibility on the ground that the four containers into which it claims that it had placed the bundles after receipt from the shipper were locked and sealed at the time when the containers were loaded aboard its ship, the S.S. Salvador. It is undisputed that the defendant received from the shipper the 100 separate bundles and that for its own convenience it placed them in the four containers. It was thereafter responsible for verifying the contents before loading the containers and issuing a clean on board bill of lading. The weight of the missing 70 bundles of tin ingots was approximately 78,885 lbs. Even if opening of the containers posed difficulties, at the very least the carrier owed a duty to verify the weight of the containers at shipside before they were placed aboard its ship and before it stated that they contained 100 bundles of tin ingots weighing the equivalent of 50,647 kilos or 111,656 lbs., which would have been 78,885 lbs. in excess of the weight of the containers actually loaded.

Defendants argue that, even if they might have been liable for breach of warranty under pre-COGSA principles outlined in *Olivier II*, Congress in effect intended the limitation of liability provisions of COGSA to override those principles in a case governed by it. *See* dissenting opinion of Judge Hays in *Encyclopaedia Britannica v. S.S. Hong Kong Producer, supra*, 422 F.2d at 19-20. We disagree, however, since courts in this circuit have long refused to hold that COGSA altered pre-COGSA law

with respect to deviation and other conduct carrying the same consequences. *See Elgie & Co. v. S.S. "S.A. Nederburg," supra*, 599 F.2d at 1181 (false representation in bill of lading that cargo was loaded on ship renders $500 per package limitation inapplicable);[4] *Encyclopaedia Britannica v. S.S. Hong Kong Producer, supra*, at 18 (unauthorized on deck stowage of goods renders $500 per package limitation inapplicable); *Jones v. The Flying Clipper, supra* (same).

Lastly, Ivarans contends that since the theft of the ingots occurred while the property was in the temporary custody of the Brazilian government it is exempted from liability by § 4(2)(q) of COGSA, 46 U.S.C. § 1304(2)(q), which was incorporated in the parties' contract. Section 4(2)(q) exempts the carrier from liability for damage or loss "arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception. . . ." The argument misconceives the nature of Berisford's claim. Its suit is not based on the theft of the ingots or on Ivarans' negligence but on the carrier's false representation that it loaded the 70 containers on its ship. Regardless whether some third party stole the ingots, the carrier here was obligated to state truthfully what it had loaded. If the carrier had truthfully stated what it had loaded on the ship, Berisford would not have been required to pay the purchase price for the 70 bundles of unloaded ingots

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4 In *Elgie & Co.* the bill of lading, notwithstanding the absence of liability limitations in the Pomerene Act, did extend by contract the application of COGSA to the entire period of time when the goods were in the carrier's custody. See 1976 A.M.C. 2446, 2449 & n.4 (not officially reported). Nevertheless, this was not advanced as a basis for departing from the fundamental rule of *Olivier II*.

which it had contracted to purchase. As between the purchaser, which could not have verified the accuracy of the carrier's representation as to the number of bundles loaded, and the carrier, the carrier is the party that must be held responsible for loss resulting from the falsity of its warranty that the goods had been loaded when in fact it had not put them aboard its ship.

Our holding leaves intact the principle that, once goods are aboard the ship as represented, a carrier may be responsible for misdescription of the apparent condition of the goods loaded by it only upon proof of knowledge or intent. *The Carso*, *supra*. We hold simply that when a carrier misrepresents its own conduct in loading goods aboard ship it is responsible for the misrepresentation and may not invoke contract provisions incorporating COGSA's limitations on liability.

The order and judgment of the district court are reversed and the case is remanded to the district court with directions to enter judgment in favor of Berisford in the sum of its full damages, plus that portion of freight and handling charges attributable to the lost bundles, and costs and interest from January 20, 1984.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

84 Civ. 6311

BERISFORD METALS CORPORATION,

Plaintiff,

—v.—

S/S SALVADOR and A/S IVARANS REDERI,

Defendants.

New York, New York—April 19, 1985—10:00 a.m.

Before:

HON. GERARD L. GOETTEL,

District Judge.

APPEARANCES:

McHUGH & O'CONNOR
John P. Conroy and Douglas A. Franklin
Attorneys for Plaintiff

HAIGHT, GARDNER, POOR & HAVENS
Chester D. Hooper and Elizabeth T. McCandless
Attorneys for Defendants

THE COURT: The following is the decision of the Court:

This is an admiralty action involving a cargo loss. The facts are straightforward and generally not in dispute.

The plaintiff commenced this action to recover damages for the nondelivery of 70 bundles of tin ingots intended to be shipped on board the S/S Salvador from Santos, Brazil to New York pursuant to defendant Ivarans Rederi Lines' bill of lading No. 202. Plaintiff purchased 100 bundles of tin ingots containing a total of 3000 ingots from Paranapanema.

Paranapanema delivered the 100 bundles to Grieg, an agent of Ivarans at a terminal where they were stuffed into four containers. Pursuant to clause 6 in the bill of lading, Ivarans was permitted to containerize the bundles for shipment.

After the containers were sealed they were delivered to a government controlled storage yard. The four containers remained in the yard for less than 24 hours. This area is part of the dock area where the S/S Salvador was loaded.

On January 4, 1984, the four containers were removed from the government storage yard and loaded on board the vessel by government stevedores.

Ivarans issued a bill of lading stamped "On Board," at the time the four containers were loaded on the S/S Salvador.

The vessel departed and made several stops before arriving in New York. When the vessel arrived in New York, the four containers were offloaded with seals and locks intact.

Upon opening, two of the containers, each supposedly containing 35 bundles, were found to be empty. The other two containers had their proper cargo in them.

The plaintiff now moves for summary judgment, arguing that the 70 bundles of tin were never loaded aboard the vessel at Santos.

The defendants acknowledge that the 70 bundles were not delivered but deny knowing where they disappeared.

There are obviously only three general locations in which the bundles could have disappeared: either before loading, during the voyage at one of the stops, or after arrival in New York.

In theory, one might conclude that an evidentiary hearing is necessary to determine where the loss occurred. But an evidentiary hearing would not accomplish a thing.

The two parties have presented all the evidence they have on the issue. Based on the evidence before us, it does not appear that the bundles were taken from the containers after arrival in New York. It would have been quite difficult to have pilfered the number of tin ingots missing during a stop on the way to New York, and so it can be argued that it appears most likely that it occurred during the 24 hours that the tin ingots were in the possession of the government's stevedores in Brazil.

There is, of course, some evidence to the contrary, namely that when the containers were moved and when they were loaded, there was no indication that they were empty, and since these bundles of tin ingots are extremely heavy, their absence should have been noted. However, it is a reasonable conclusion from all of the facts presented that it probably occurred before loading.

Two other factual issues are supposedly disputed. In this Court's view they are not truly factual issues at all but conclusions of law which have no bearing upon the ultimate determination of this case.

There is no indication that the holding of any evidentiary hearing would clarify the issues to be faced and there appears to be no reason to hide behind the possibility that a trial could lessen the difficulty of deciding the legal issues now presented.

The bill of lading contains an express provision extending the application of The Carriage of Goods by Sea Act, 46 U.S.C. § 1300 et seq. (hereinafter "COGSA") throughout the entire time the goods were in the carrier's custody, including the period of time before loading and after discharge from the ship.

COGSA contains the usual provisions for a package limitation unless a higher value has been declared in writing prior to delivery and inserted in the bill of lading, in which case the carrier obtains an additional payment. 46 U.S.C. § 1304(5).

It has been this Court's observation that this is very rarely done. It is apparently far cheaper to simply obtain insurance for the shipment which would be necessary in any event and

not to declare the excess value. In this instance, the plaintiff is actually the insurer of the shipment seeking subrogation.

Initially, the defendants argue that they have no liability whatever for this loss since the containers were in the possession of Brazilian Government stevedores for a period of 24 hours, and if, as the plaintiff argues, that is the time at which the loss occurred, defendants should not be held responsible.

The Court cannot accept this concept. While there are cases which find that a carrier is not liable when goods disappear after unloading into the possession of government stevedores, this is not that kind of case.

The goods were given to the defendant Ivaran, delivered to it and stored by it. Putting the goods into a container had some value to both parties, but it did mean that for the period prior to the loading, the goods were out of its possession and Ivaran didn't open the container to check and see whether the goods were still in the container when it issued its on board bill of lading. Under these circumstances, the carrier must take responsibility for the loading procedure.

The carrier asserts that, assuming it is liable, it is liable only to the extent of the package limitation which in this instance would be $35,000, which is only a small part of the total loss.

The plaintiff argues that the package limitation cannot be asserted here because there was a "quasi deviation" which deprives the carrier of the benefits of the bill of lading, including the package limitation.

The plaintiff acknowledges that COGSA was in effect during the period when the loss probably occurred. It argues, however, that the issuance of an on board bill of lading when, in fact, the goods have not been loaded, constitutes a quasi deviation.

It appears clear that if there was any proof that the carrier knew that the goods had not been loaded and, nevertheless, issued an on board bill, they would be estopped to deny the loading and they would have lost their protection under COGSA.

That, however, is not the case before this Court. Even accepting the plaintiff's argument that in all likelihood the loss occurred before loading, there is no proof whatever that the carrier was aware of that fact when it issued the on board bill.

The plaintiff relies on *Elgie Co. v. S. S. S. A. Nederburg*, 559 F.2d 1177 (2d Cir. 1979) with which I am intimately familiar.

In *Nederburg*, the Second Circuit, sua sponte, developed the approach that on outbound shipments, the Pomerene Act controlled and since in that instance the bill of lading did not make COGSA effective at the time of delivery at the pier, the COGSA package limitation did not apply when the goods were, in fact, not loaded.

The Pomerene Act has no extra-territorial effect and does not apply, since these goods were loaded in Brazil and the bill of lading was issued in Brazil.

The plaintiff argues that some of the reasoning in the *Nederburg* case, if applied here, could be used to find that the absence of the cargo, for which a bill of lading was issued, constituted a quasi deviation negating the availability of the COGSA package limitation, 46 U.S.C. § 1304(5).

It is an interesting argument. However, there have been literally thousands of similar cases since the time that *Olivier Straw Goods Corporation v. Osaka Shosen Kaisha*, 27 F.2d 129 (2d Cir. 1928) and 47 F.2d 878 (2d Cir. 1931), was first decided and even since the *Nederburg* case was decided, and this approach has never been accepted by any court, to my knowledge. If it is going to be accepted by any court, it is going to have to be a higher court accustomed to making the law in the admiralty field and not by a district court.

Consequently, the Court finds that the plaintiff is entitled to recover but its recovery is limited to the package limitation, and judgment should be entered in its favor in the amount of $35,000.

Judgment may be entered with costs for the plaintiff.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of January one thousand nine hundred and eighty-six.

Present:

HON. HENRY J. FRIENDLY,
HON. WALTER R. MANSFIELD,
HON. RALPH K. WINTER,
Circuit Judges.

Docket Nos. 85-7401, 85-7429

BERISFORD METALS CORPORATION,

Plaintiff-Appellant
Cross-Appellee,

—v.—

S/S SALVADOR, her engines, boilers, etc.
and A/S IVARANS REDERI,

Defendant-Appellees
Cross-Appellants.

A petition for rehearing having been filed herein by Appellee-S/S SALVADOR and A/S IVARANS REDERI

Upon consideration thereof, it is

Order that said petition be and it hereby is DENIED.

/s/ ELAINE B. GOLDSMITH

Clerk

INTERNATIONAL CONVENTION

FOR THE UNIFICATION OF CERTAIN RULES RELATING TO (OCEAN) BILLS OF LADING SIGNED AT BRUSSELS, THE 25TH AUGUST, 1924

U.S. Treaty Series No. 931
U.S. Statutes at Large, Volume 51, page 233
League of Nations Treaty Series, Volume 120,
pages 155, 157, 183

Translation by U.S. State Department

The President of the German Republic, the President of the Argentine Republic, His Majesty the King of the Belgians, the President of the Republic of Chile, the President of the Republic of Cuba, His Majesty the King of Denmark and Iceland, His Majesty the King of Spain, the Chief of the Estonian State,* the President of the United States of America, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Possessions Beyond the Seas, Emperor of India, His Serene Highness the Governor of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia,* the President of the Republic of Mexico, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Peru, the President of the Republic of Poland, the President of the Portuguese Republic, His Majesty the King of Rumania, His Majesty the King of the Serbs, Croats, and Slovenes,† His Majesty the King of Sweden and the President of the Republic of Uruguay, (26).

Having recognized the utility of laying down in common accord certain uniform rules relating to bills of lading, have

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* Since 1940, members of the U.S.S.R.

† Now Yugoslavia.

decided to conclude a convention to that effect and have designated as their Plenipotentiaries, namely:

(The list of attending Diplomatic Plenipotentiaries of fourteen out of twenty-six participating States is here omitted. The eighteen Signers of the Convention appear at pages 67 and 70.)

Who, duly authorized therefor have agreed as follows:

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO (OCEAN) BILLS OF LADING

(Translation by the U.S. State Department)

ARTICLE I.—DEFINITIONS.

In this convention the following words are employed with the meanings set out below:

(a) "Carrier" includes the owner of the vessel or the charterer who enters into a contract of carriage with a shipper.

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea; it also applies to any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such instrument regulates the relations between a carrier and a holder of the same.

(c) "Goods" includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) "Ship" means any vessel used for the carriage of goods by sea.

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

ARTICLE II.—RISKS.

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

ARTICLE III.—RESPONSIBILITIES AND LIABILITIES.

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

2. Subject to the provisions of Article IV the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identfication of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

(c) The apparent order and condition of the goods;

Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b), and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading. At the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, it shall for the purpose of this article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

ARTICLE IV.—RIGHTS AND IMMUNITIES.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped, and supplied and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of

paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier.

(c) Perils, dangers, and accidents of the sea or other navigable waters.

(d) Act of God.

(e) Act of war.

(f) Act of public enemies.

(g) Arrest or restraint of princes, rulers, or people or seizure under legal process.

(h) Quarantine restrictions.

(i) Act or omission of the shipper or owner of the goods, his agent, or representative.

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general.

(k) Riots and civil commotions.

(l) Saving or attempting to save life or property at sea.

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy or marks.

(p) Latent defects not discoverable by due diligence.

(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling* per package or unit or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

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* The First Understanding (p. 77, infra) declares that the corresponding amount shall be $500 lawful money of the United States. See also Article IX, (p. 62, infra); and Section 4 (5) of the Act (p. 8, supra).

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier has not consented with knowledge of their nature and character may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

ARTICLE V.—SURRENDER OF RIGHTS AND IMMUNITIES AND INCREASE OF RESPONSIBILITIES AND LIABILITIES.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities, or to increase any of his responsibilities and liabilities under this convention provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of this convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

ARTICLE VI.—SPECIAL CONDITIONS.

Notwithstanding the provisions of the preceding articles, a carrier, master, or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or concerning his obligation as to seaworthiness so far as this stipulation is not contrary to public policy, or concerning the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

ARTICLE VII.—LIMITATIONS ON THE APPLICATION OF THE RULES.

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.

ARTICLE VIII.—LIMITATION OF LIABILITY.

The provisions of this convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of seagoing vessels.*

ARTICLE IX.

The monetary units mentioned in this convention are to be taken to be gold value.*

Those contracting states in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.†

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

ARTICLE X.

The provisions of this convention shall apply to all bills of lading issued in any of the contracting States.††

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* See Part III.

* The effect of this provision is nullified for the United States by the declaration of the First Understanding, p. 77, infra.

† Congress has declared the equivalent to be $500 lawful money of the United States. See Section 4 (5) of the Act of April 15, 1936, p. 8, supra.

†† The declaration of the Second Understanding is that in the event of a conflict, the text of the Act of April 15, 1936, shall prevail over the text of the Convention. The Act applies only to bills of lading in foreign commerce; hence the Convention also applies only to foreign commerce of the United States and not to domestic commerce, where its use is optional.

* Not yet (1951) implemented by ratification.

ARTICLE XI.

After an interval of not more than two years from the day on which the convention is signed, the Belgian Government shall place itself in communication with the governments of the high contracting parties which have declared themselves prepared to ratify the convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said governments. The first deposit of ratifications shall be recorded in a proces-verbal signed by the representatives of the powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Belgian Government and accompanied by the instrument of ratification.

A duly certified copy of the proces-verbal relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the powers who have signed this convention or who have acceded to it. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

ARTICLE XII.

Nonsignatory States may accede to the present convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the convention a duly certified copy of the notification and of the act of

accession, mentioning the date on which it received the notification.

ARTICLE XIII.

The high contracting parties may at the time of signature, ratification, or accession declare that their acceptance of the present convention does not include any or all the self-governing dominions, or of the colonies, overseas possessions, protectorates, or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate, or territory excluded in their declaration. They may also denounce the convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate, or territory under their sovereignty or authority.

ARTICLE XIV.

The present convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the proces-verbal recording such deposit. As respects the States which ratify subsequently or which accede, and also in cases in which the convention is subsequently put into effect in accordance with Article XIII, it shall take effect six months after the notifications specified in paragraph 2 of Article XI, and paragraph 2 of Article XII, have been received by the Belgian Government.

ARTICLE XV.

In the event of one of the contracting States wishing to denounce the present convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all other States informing them of the date on which it was received.

The denunciation shall only operate in respect of the State which made the notification, and on the expiry of one year after the notification has reached the Belgian Government.

ARTICLE XVI.

Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should notify its intention to the other States through the Belgian Government which would make arrangements for convening the conference.

Done at Brussels, in a single copy August 25, 1924.

Signatures ad referendum: Chile,* Estonia,* France, Germany, Great Britain, Hungary, Italy, Japan,* with reservations, Poland and Danzig, Rumania, Spain, United States of America, Yugoslavia.* The names of the individual signers appear on pages 66 and 68.

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* Not yet (1951) implemented by ratification.

CHAPTER 28—CARRIAGE OF GOODS BY SEA

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§ 1300. Bills of lading subject to chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.

(Apr. 16, 1936, ch. 229, 49 Stat. 1207.)

§ 1301. Definitions

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

(Apr. 16, 1936, ch. 229, § 1, 49 Stat. 1208.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1313 of this title.

§ 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

(Apr. 16, 1936, ch. 229, § 2, 49 Stat. 1208).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1313 of this title.

§ 1303. Responsibilities and liabilities of carrier and ship

(1) Seaworthiness

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) Cargo

The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) Contents of bill

After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper,

issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Bill as prima facie evidence

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of the Act of August 29, 1916, commonly known as the "Pomerene Bills of Lading Act" [49 App. U.S.C. 81 et seq.].

(5) Guaranty of statements

The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in

no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Notice of loss or damage; limitation of actions

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery therof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) "Shipped" bill of lading

After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up

any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Limitation of liability for negligence

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

(Apr. 16, 1936, ch. 229, § 3, 49 Stat. 1208.)

REFERENCES IN TEXT

The Pomerene Bills of Lading Act, referred to in par. (4) is act Aug. 29. 1916, ch. 415, 39 Stat. 538, as amended, which is classified generally to chapter 4 (§ 81 et seq.) of Title 49, Appendix, Transportation. For complete classification of this Act to the Code, see Short Title note set out under section 81 of Title 49, Appendix, and Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1302, 1304, 1306, 1313 of this title.

§ 1304. Rights and immunities of carrier and ship

(1) Unseaworthiness

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Uncontrollable causes of loss

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) Freedom from negligence

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Deviations

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Amount of liability: valuation of cargo

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Inflammable, explosive, or dangerous cargo

Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and charac-

ter, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

(Apr. 16, 1936, ch. 229, § 4, 49 Stat. 1210.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1302, 1306, 1313 of this title.

§ 1305. Surrender of rights; increase of liabilities; charter parties; general average

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

(Apr. 16, 1936, ch. 229. § 5, 49 Stat. 1211.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1306, 1309, 1313 of this title.

§ 1306. Special agreement as to particular goods

Notwithstanding the provisions of sections 1303 to 1305 of this title, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary commercial shipments made in the ordianry course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

(Apr. 16, 1936, ch. 229, § 6, 49 Stat. 1211.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1302, 1313 of this title.

§ 1307. Agreement as to liability prior to loading or after discharge

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

(Apr. 16, 1936, ch. 229, § 7, 49 Stat. 1212.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1313 of this title.

§ 1308. Rights and liabilities under other provisions

The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916 [46 U.S.C. 801 et seq.], or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

(Apr. 16, 1936, ch. 229, § 8, 49 Stat. 1212.)

REFERENCES IN TEXT

The Shipping Act of 1916, referred to in text, is act Sept. 7, 1916, ch. 451, 39 Stat. 728, as amended, which is classified principally to chapter 23 (§ 801 et seq.) of this title. For complete classification of this Act to the Code, see section 842 of this title and Tables.

Section 175 of this title, referred to in text, was repealed by act Oct. 9, 1940, ch. 777, § 7, 54 Stat. 1028.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1313 of this title.

§ 1309. Discrimination between competing shippers

Nothing contained in this chapter shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this chapter; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title: of (c) in any other way prohibited by the Shipping Act, 1916, as amended [46 U.S.C. 801 et seq.].

(Apr. 16, 1936, ch. 229, § 9, 49 Stat. 1212.)

REFERENCES IN TEXT

The Shipping Act of 1916, as amended, referred to in text, is act Sept. 7, 1916, ch. 451, 39 Stat. 728, as amended, which is classified principally to chapter 23 (§ 801 et seq.) of this title. For complete classification of this Act to the Code, see section 842 of this title and Tables.

§ 1310. Weight of bulk cargo

Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

(Apr. 16, 1936, ch. 229, § 11, 49 Stat. 1212.)

§ 1311. Liabilities before loading and after discharge; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

(Apr. 16, 1936, ch. 229, § 12, 49 Stat. 1212.)

§ 1312. Scope of chapter; "United States"; "foreign trade"

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

(Apr. 16, 1936, ch. 229, § 13, 49 Stat. 1212; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.)

CODIFICATION

A proviso in second sentence of this section that the Philippine Legislature might by law exclude its application to transportation to or from ports of the Philippine Islands was omitted in view of Proc. No. 2695, set out under section 1394 of Title 22, Foreign Relations and Intercourse, which proclaimed the independence of the Philippines.

§ 1313. Suspension of provisions by President

Upon the certification of the Secretary of Transportation that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this chapter, effective during any period when sections 1301 to 1308 of this title, or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

(Apr. 16, 1936, ch. 339, § 14, 49 Stat. 1213, Aug. 6, 1981, Pub. L. 97-31, § 12(146), 95 Stat. 166.)

AMENDMENTS

1981—Pub. L. 97-31 substituted in first par. "Secretary of Transportation" for "Secretary of Commerce".

§ 1314. Effective date; retroactive effect

This chapter shall take effect ninety days after April 16, 1936; but nothing in this chapter shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title issued, whether before or after such date in pursuance of any such contract as aforesaid.

(Apr. 16, 1936, ch. 229, § 15, 49 Stat. 1213.)

§ 1315. Short title

This chapter may be cited as the "Carriage of Goods by Sea Act."

(Apr. 16, 1936, ch. 229, § 16, 49 Stat. 1213.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original "This Act", meaning act Apr. 16, 1936, ch. 229, 49 Stat. 1207, which enacted this chapter and amended section 25 of former Title 49, Transportation. For complete classification of this Act to the Code, see Tables.

ORIGINAL

88-1750

No.

Supreme Court, U.S.
FILED
MAY 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

S/S SALVADOR, her engines, boilers, etc.,
and A/S IVARANS REDERI,

Petitioners,

against

BERISFORD METALS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN P. CONROY
80 Pine Street
New York, N.Y. 10005
(212) 422-0222

Counsel for Respondent

QUESTION PRESENTED

Whether the Court of Appeals fully considered and correctly decided, based upon established practices of international trade, the Congressional intent in the enactment of the Carriage of Goods by Sea Act, 46 U.S.C. §1300, *et seq.*, (hereinafter COGSA) and an unbroken line of authority, that an ocean carrier which falsely issues an on-board bill of lading for 100 bundles of tin ingots upon which the consignee relied in good faith, is denied the benefit of the package limitation contained in COGSA, 46 U.S.C. 1304(5) with respect to 70 bundles that were not loaded aboard.[1]

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[1] The Court of Appeals did not "set aside" §1304(5), as imputed to it by petitioner (Petition, page i). It merely found the section inapplicable to the facts in this case.

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Statement Pursuant to Supreme Court Rule 28.1

Respondent, Berisford Metals Corporation, is a wholly-owned subsidiary of S&W Berisford PLC of London, England. S&W Berisford has a large number of subsidiaries worldwide. Most, however, are wholly-owned and therefore need not be disclosed according to the office of the Clerk of this Court. The remaining co-subsidiaries (with locations of main offices) are:

Berisford Malaysia Sdn Bhd	Kuala Lumpur, Malaysia
J.H. Rayner Espana S.A.	Madrid, Spain
Sociedade Esportadora e Importadora "Cetoma" Ltda.	Rio de Janeiro, Brazil
North Solomons Plantation Development Corp Pty. Ltd.	Papua, New Guinea
Kopi International Holdings Pty. Ltd.	Papua, New Guinea
Rayner Golbin Pty. Ltd.	Silverwater, Australia
Tradeco Holdings Ltd.	New York, New York
W.H. Wardle (Metals) Ltd.	Shropshire, England
Berisford Espana S.A.	Muria, Spain
Castlebar Bacon Co. Ltd.	Castlebar, Ireland
Kilsern Distillers Ltd.	Leicester, England
Capital Wine & Travers Ltd.	Leicester, England
Ketlon (U.K.) Ltd.	Paddock Wood, Kent, England
Wickman Bennett Machine Tool Inc.	Warwick, Rhode Island
Wickman Exeter Ltd.	Birmingham, England
Berisford Cresvale Ltd.	London, England
Cresvale International Inc.	New York, New York

Berisford Mocatta Ltd.	London, England
Albion Trust Ltd.	London, England
Craneheath Securities Ltd.	London, England

Respondent itself has no subsidiaries which are not wholly-owned by it.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

S/S SALVADOR, her engines, boilers, etc.,
and A/S IVARANS REDERI,

Petitioners,

against

BERISFORD METALS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Berisford Metals Corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case.

REASONS WHY THE WRIT SHOULD BE DENIED

In opposing the petition herein, we do not presume or attempt to articulate any better or with any more force the traditional principles of admiralty law as expressed in the clear and reasoned decision herein of the Second Circuit. It fully considered and correctly decided the issues. However, we feel that certain points raised by petitioners, albeit belatedly,[2] should be addressed merely to support a denial of the petition.

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[2] Point I of the Petition was first raised on the petition for rehearing to the Second Circuit.

POINT I

Petitioners' arguments are based upon inapplicable considerations or false premises and are without merit.

A. Opinion below concerned interpretation of statute not treaty.

Under Point I of its argument, petitioners contend that the judgment of the Court of Appeals stems from one radical error, *i.e.*, it failed to give effect to a treaty entitled "International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading" (the "Hague Rules"), which was ratified by the United States in 1937. The court, however, was not faced with interpreting or giving effect to the treaty but rather with the United States COGSA and decisions of the American courts,[3] both before and after its enactment, concerning the admiralty concept of deviation and the impact on an ocean carrier's liability when it issues a false on-board bill of lading upon which there is reliance.

While it is true that the treaty sought to unify certain rules relating to ocean bills of lading among the various signatories, it was not adopted verbatim into American law. It was implemented by enactment of the United States COGSA but with the understanding that should

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[3] *St. John's N.F. Shipping Corp. v. Companhia Geral, etc.*, 263 U.S. 119 (1923); *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 47 F.2d 878 (2d Cir. 1931), *cert. denied*, 283 U.S. 856; *The Carso*, 53 F.2d 374 (2d Cir. 1931); *General Foods Corp. v. The Felipe Camaro*, 172 F.2d 131 (2d Cir. 1949); *Searoad Shipping Co. v. E.I. Dupont*, 361 F.2d 833 (5th Cir.), *cert. denied*, 385 U.S. 973 (1966); *Portland Fish Co. v. States SS Co.*, 510 F.2d 628 (9th Cir. 1974); *Miles Metal Corp. v. M.S. Havjo*, 494 F.2d 563 (2d Cir. 1974); *Spartus Corp. v. SS Yafo*, 590 F.2d 1310 (5th Cir. 1979); *Elgie v. S.S.S.A. Nederburg*, 599 F.2d 1177 (2d Cir. 1979), *cert. denied*, 444 U.S. 1072; *Calmaquip Engineering Corp. v. West Coast Carriers Ltd.*, 650 F.2d 633 (9th Cir. 1981).

any conflict arise between the provisions of the Convention and the provisions of COGSA, the latter shall prevail. (Petition appendix page 35a footnote; 51 Stat. 233).

No country has a statute exactly like the U.S. COGSA which statute, Congress has said with all possible clarity, is to apply. Gilmore and Black, *The Law of Admiralty*, 2d edition, page 145, footnote 23.

Furthermore, the Act specifically left intact and with continuing full force and effect, its 1893 forerunner, the Harter Act, 46 U.S.C. §190, *et seq.*, and the Pomerene Bills of Lading Act, 49 U.S.C. §41, *et seq.*, and it is universal practice to cite Harter cases to COGSA points, where applicable. *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628, 631 n. 3 (9th Cir. 1974).

Harter's purpose was to remedy abuses which had arisen through efforts of shipowners engaged in common carriage to limit unreasonably their obligations as carriers of goods. *Koppers Connecticut Coke Company v. James McWilliams Blue Line*, 89 F.2d 865 (2d Cir. 1937), *cert. denied*, 302 U.S. 706; *The Willdomino*, 300 Fed.5 (3d Cir. 1924), *affirmed*, 272 U.S. 718.

The enactment by Congress in 1916 of the Pomerene Act was to insure the integrity of bills of lading as instruments of commerce. In construing its constitutionality, this Court stated in *U.S. v. Ferger*, 250 U.S. 199 (1919), 204-205:

> That bills of lading for the movement of interstate commerce are instrumentalities of that commerce which Congress under its power to regulate commerce has the authority to deal with and provide for is too clear for anything but statement, as manifested not only by that which is concluded by prior decisions, but also by the exertion of the power of Congress. * * * That as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the

> flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, *both domestic and foreign,* largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number of transactions in *domestic and foreign exchange,* is also so certain and well known that we may notice it without proof. (Emphasis added).

Thus, the Court of Appeals in this instance did not stray from but rather was consistent in following the course that has been purposely set by Congressional enactments and the rule of *stare decisis,* in upholding the principle that

> A negotiable or order bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involved in the sale and transportation of goods between parties located at a distance from one another. (Petition appendix page 9a)

Indeed, as petitioners' co-counsel so aptly observed in another context:

> One of the great objectives of both Acts (Harter and COGSA) is to prevent the impairment of the value and negotiability of the ocean bill of lading. Gilmore and Black, *supra,* 145-146.

If it was the intent of Congress to abolish the extensive body of pre-COGSA statutory and common law regarding ocean bills of lading then it was inconsistent in specifically reserving in the Act the continuing force and effect of both Harter and Pomerene.

Petitioners are critical of the seminal decision in *Jones v. Flying Clipper,* 116 F. Supp. 386 (S.D.N.Y. 1953) by District Judge Edward Weinfeld, which has been cited with approval or relied on in numerous decisions of both circuit and district courts. *Spartus Corp. v. S.S. Yafo, supra,* 590 F.2d 1316-1317. Faced with the identical issue as here, *i.e.,* whether the adoption of COGSA superseded or overrode the then existing body of law regarding the consequence of ocean carrier deviation, Judge Weinfeld found nothing in the legislative history of the Act to indicate that Congress, by fixing the package limitation at $500.00, intended to displace the doctrine of unjustifiable deviation which was so firmly entrenched in maritime law. In arriving at its conclusion, the district court traced the Congressional history of the Act[4] and found expression of legislative intent in the following statement of then Senator White, one of the Act's leading advocates:

> The legislation supersedes the so-called 'Harter Act' from the time the goods are loaded on the ship to the time they are discharged from the ship. *Otherwise, our law remains precisely as it is, unaffected and unimpaired by the proposed legislation.* (Emphasis added)

116 F. Supp. 389, footnote 11.

The *Jones* decision found additional support in the holding of *Stag Line, Ltd. v. Foscolo, Mango & Co., Ltd., (The Ixia),* 1932 Appeal Cases 328, wherein the House of Lords held that the English Act of 1924, the equivalent of the American COGSA, did not alter the substantive English law that theretofore prevailed regarding carrier deviation which deprived the ship of protection of exceptions in its bill of lading.

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[4] In *Atlantic Mutual Insurance Co. v. Poseidon, etc.,* 313 F.2d 872 (7th Cir. 1963), *cert. denied,* 375 U.S. 819, the Seventh Circuit apparently did not consider the history or Congressional intent underlying the Act.

Petitioners concede (Petition page 12, footnote 8) that even the domestic laws of France and Scandinavia have limited the effect of the Hague Rules regarding package limitation where the carrier has been guilty of fraud or intentional misconduct.

Thus, the signatories to the Hague Convention, including the United States, have reserved by their own enactments or preserved their own rules of law regarding carrier deviation that existed prior to the Convention. Clearly, the "uniformity" regarding the consequences of ocean carrier deviation which petitioners so arduously press the Court to enact, has not been accepted by the other maritime nations.

B. Carrier's misconduct vitiated bill of lading including package limitation clause

Petitioners' argument under Point II is grounded upon the equities existing between the shipper and the carrier, *i.e.*, each does or should rely on the limitation contained in the bill of lading. But this begs the question, since such a fundamental breach going to the essence of the carrier's contract as we have here, results in no contract and all of its terms are vitiated. *Jones v. Flying Clipper, supra,* 338; and the carrier thereby loses the benefit of the defenses and limitations inserted in the bill of lading for its benefit. *The St. John's N.F. Shipping Corporation v. S.A. Companhia Geral, etc., supra.*

As early as 1907, the Ninth Circuit in *Pacific Coast Co. v. Yukon Independent Transportation Co.,* 155 Fed. 29, 33-34, held that an ocean carrier's deviation denied to it bill of lading clauses inserted in its favor. It quoted with approval the following language which is equally appropriate and to the point in the instant case:

> "It is unnecessary to say that if, under the circumstances of a particular case, the stipulation were unreasonable or worked a manifest injustice to the libelants, we should not give it effect."

* * *

> For this reason the courts are compelled, when called upon to enforce them, to construe such contracts fairly, and to reject stipulations which are unreasonable, and to deny carriers all unfair advantages claimed by reason of exemptions from liability for negligence or *plain violation of the carrier's obligation.* In order to give a fair construction to a contract, all its parts must be considered, and conditions and circumstances which the evidence proves were known to the parties and contemplated by them in making it. (Emphasis added)

* * *

> In construing bills of lading, as in construing other commercial instruments, it is the right and duty of the court to look, not only to the language employed, but to the subject-matter and to the surrounding circumstances, in order to determine the proper effect of the language used, by putting itself so far as possible in the place of the contracting parties.

Here, the subject matter was 3,000 tin ingots for which Berisford paid $663,000.00 in reliance on petitioners' representation, *i.e.*, warranty, that they *had loaded* the goods aboard the vessel in fulfillment of their statutory and contractual obligation. In fact, 2100 ingots, although received by petitioner Ivarans, never were loaded. It would be difficult to imagine a more classic example of a fundamental breach going to the essence of the contract as found by the Court of Appeals. Petitioners would have the courts completely ignore the surrounding circumstances leading up to the issuance of the bill of lading and give rigid and unswerving effect to a clause therein beneficial only to the carrier, when its own misconduct vitiated the same contract it seeks to enforce.

Petitioners' protest of disproportionality and inequity rings hollow in face of the fact that it received goods worth over $475,000.00 and then failed to account for them before representing that they had been loaded aboard. To accept petitioners' argument would be to invite rampant fraud or mischief on the part of the carriers. They would be secure in the knowledge that once having received a shipment for carriage worth many times in excess of the package limitation, they could with impunity dispose of the goods or fail to account for them *before* loading and then respond merely for the package limitation. Under this scenario, the disproportionality against cargo interests is self-evident and reliance on on-board bills of lading by the international trade community would come to a standstill.

The Second Circuit emphasized that a false bill of lading, with respect to loading of cargo, would adversely impact on trade and subvert reliance thereon as an essential method of facilitating such trade. Breaking the limitation in "a few odd cases," say petitioners, will not contribute to this confidence but we disagree. It reassures both carrier and cargo interests that the law continues to uphold the integrity of such bills as negotiable documents and that it will not countenance their use being undermined by a carrier's false representation relating to its own conduct.

C. Intermodal system of carriage is not involved.

Under Point III, petitioners voice concern as to the harmful consequences that might flow regarding a multimodal transportation system, if the decision below is upheld. However, their fears are ill-founded since containers are not involved here except insofar as the carrier used them for its own convenience. The shipper delivered 100 pallets in breakbulk (*i.e.*, non-containerized) condition to the carrier at Santos and the bill of lading represents that 100 pallets, not containers, were loaded on board.

The Ninth Circuit considered and rejected the very same argument in *Portland Fish Company v. States Steamship Company*, 510 F.2d 628 (1974), *rehearing denied*, 634, which also involved a breakbulk shipment. Paradoxically, petitioners have quoted the very portion of the Court's opinion dealing with this issue, at page 21 of their petition.

Petitioners assert (Petition page 16) that the opinion below:

> indicates that the guarantee (of receipt of quantity) will apply even to cargo received by the carrier in sealed ocean containers.

This is simply not so as revealed by a fair reading of the opinion (Petition appendix page 16a.):

> Defendants cannot escape responsibility on the ground that the four containers into which it claims that it had placed the bundles after receipt from the shipper were locked and sealed at the time when the containers were loaded aboard its ship, the SS SALVADOR. It is undisputed that the defendant received from the shipper the 100 separate bundles and that for its own convenience it placed them in the four containers. It was thereafter responsible for verifying the contents before loading the containers and issuing a clean on-board bill of lading.

POINT II

The issues raised do not warrant review by this Court.

Inasmuch as the decision below turns upon its peculiar facts and involves the rare instance where an ocean carrier receives a breakbulk shipment and then issues an on-board bill of lading which misrepresents the quantity loaded and upon which there is reliance, the issues presented are of little importance to other than the litigants and do not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN P. CONROY
80 Pine Street
New York, N.Y. 10005
(212) 422-0222

Counsel for Respondent

DOUGLAS A. FRANKLIN
Of Counsel

MOTION FILED
MAY 22 1986

No. 85-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

S/S SALVADOR, her engines, boilers, etc.
and A/S IVARANS REDERI,

Petitioners,

—against—

BERISFORD METALS CORPORATION,

Respondent.

MOTION OF AMERICAN PRESIDENT LINES, LTD. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL J. RYAN
Attorney for *Amicus Curiae*
American President Lines, Ltd.
One World Trade Center
Suite 5215
New York, New York 10004
(212) 839-7000

Christopher Raleigh
Hill, Betts & Nash
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1750

S/S SALVADOR, her engines, boilers, etc.
and A/S IVARANS REDERI,

Petitioners,

—against—

BERISFORD METALS CORPORATION,

Respondent.

MOTION OF AMERICAN PRESIDENT LINES, LTD. FOR LEAVE TO FILE ANNEXED BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of the Supreme Court, American President Lines, Ltd. (hereinafter "APL") respectfully moves this Honorable Court for leave to file the annexed brief as *Amicus Curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. Consent to the filing of the brief has been given on behalf of Petitioners. Consent to the filing of the brief was sought from, but not granted by Respondent Berisford Metals Corporation.

American President Lines, Ltd. is a United States corporation whose principal business is the operation of a containerized transportation system. As part of this system, APL owns and operates some eighteen U.S. Flag vessels specifically designed for the carriage of containers and containerized cargo, the largest being capable of carrying 2,500 twenty-foot containers at one time.

APL's principal service in which these vessels operate is between the west coast of the United States and the Far East. APL also services ports in south and west Asia by means of feeder vessels. APL services some twenty-seven sea ports in the Far East and south and west Asia ranging from Kuwait to Yokohama. The principal sea ports serviced on the west coast of the United States are Seattle, Oakland and San Pedro. It also services Dutch Harbor and Guam.

It provides a comprehensive system of transportation which includes service from and/or to some 461 cities in the United States and 134 foreign cities. As part of the transportation service offered, transportation of containerized cargo utilizes not only ocean carriage, but also overland rail transportation in the United States and localized transportation by rail or truck.

In conjunction with its container service, APL owns or leases approximately 35,700 containers and, in the course of its operations in 1985, moved some 158,000 FEUs[1] from Far East and Asian ports and some 123,000 FEUs to such ports.

In this case, the Court of Appeals for the Second Circuit precluded the ocean carrier from limiting its liability pursuant to the bill of lading contract which called for the application of Section 4(5) of the United States Carriage of Goods By Sea Act, 46 U.S.C. § 1304(5). The Court refused to limit the ocean carrier's liability on the basis that the bill of lading "erroneously" stated that certain goods had been loaded on board the vessel.

---

1 "Forty Foot Equivalent Unit"; essentially a forty foot container.

The Second Circuit Court of Appeals stated the carrier, having loaded bundles of ingots into containers, was:

> ". . . thereafter responsible for verifying the contents before loading the containers and issuing a clean on-board bill of lading . . . Even if opening of the containers posed difficulties, at the very least the carrier owed a duty to verify the weight of the containers at shipside before they were placed aboard its ship . . ." (Petitioner's Appendix, pg. 16(a).)

APL receives and transports containerized cargo which is submitted to it in various forms. It transports containers which are loaded at in-land locations by shippers and delivered to it in a loaded and sealed condition for ultimate delivery to consignees overseas. It also receives shipments to be placed in containers for carriage and delivery overseas. Frequently, it receives loaded and sealed containers which have been consolidated by "NVOCCs".[2] Usually, the NVOCC issues its own bill of lading for the individual shipments which it consolidates and containerizes. APL will issue a bill of lading the NVOCC who acts essentially as a shipper vis-a-vis APL.

The bills of lading are generally prepared by the shipper's freight forwarder and submitted to APL for execution. Likewise, this documentation is rarely accomplished, if ever, at shipside. The execution of bills of lading are usually accomplished in an office far removed from the terminal where the containers are loaded on board the vessel.

While the Court of Appeals for the Second Circuit pronounced a minimal "duty" for the carrier to verify the weight of a container at shipside, APL is not aware of any scales available at shipside at the ports which it services. At its sea terminals in the United States, Japan and Taiwan, scales are available; however, these are located at the entrance gate to the terminal, not at the loading berth. As to other ports, APL does

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2 "NVOCC"; Non vessel operating common carrier.

not control the use of any scales even available at the gate entrance. The cost of purchase and installation of a scale from which a certified weight could be taken is approximately $50,000.00 per scale.

The time which would be involved to drop weigh[3] a container would usually require a minimum of 15/20 minutes with two men involved.

APL expresses great concern as to the negative impact which the decision of the Court of Appeals for the Second Circuit will have on the speedy, economic and efficient employment of containers as a means of ocean/multimodal transportation which has been the key and essential purpose in the development of container vessels and containerized operations and which brings advantages to both cargo interests and container carrying operators.

It is respectfully submitted that the decision below did not consider this impact, but viewed the facts involved essentially under the practices of yesteryear when individual break-bulk cases, casks or cartons were received at shipside, tallied and documentation issued almost simultaneously with loading.

APL earnestly submits that it is most appropriate, indeed essential, that this Court grant the Petition to enable consideration of the overall aspects of the decision with respect to containerized transportation and, in this regard, APL respectfully requests leave to file the annexed brief.

---

3 Placing the container and its carrying chassis on the scale, releasing the prime mover and then ascertaining the tare value of the container and chassis to obtain the net weight of cargo.

Dated: New York, New York
May 22, 1986

Respectfully submitted,

MICHAEL J. RYAN
Attorney for *Amicus Curiae*
American President Lines, Ltd.
One World Trade Center
Suite 5215
New York, New York 10048
(212) 839-7000

CHRISTOPHER RALEIGH
HILL, BETTS & NASH
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1750

S/S SALVADOR, her engines, boilers, etc.
and A/S IVARANS REDERI,

Petitioners,

—against—

BERISFORD METALS CORPORATION,

Respondent.

BRIEF OF AMICUS CURIAE AMERICAN PRESIDENT LINES, LTD.

Statement of Interest of American President Lines, Ltd.

American President Lines, Ltd. is a United States Corporation whose principal business is the operation of a containerized transportation system. It owns and operates some eighteen U.S. Flag vessels specifically designed for the carriage of containers and containerized cargo and operates these vessels principally between the west coast of the United States and the Far East. In conjunction with this service, it services some twenty-seven seaports in the Far East and south and west Asia with three principal seaports serviced on the west coast of the United States. Its transportation system includes service from and/or to some 461 cities in the United States and some 134 cities in foreign countries.

American President Lines, Ltd. has a significant investment in furnishing modern containerized equipment in an effort to afford an efficient and economic system of transportation involving the use of containers for the transportation of cargo. It is greatly concerned as to the negative impact which the decision of the Court of Appeals for the Second Circuit will have with respect to container transportation to the detriment of its system of container transportation, the cargo interests which it serves and container transportation as a whole.

ARGUMENT

Point I

The Decision Below Overlooks And Disregards The Practical Aspects Of Container Operation

The advent of container transportation was generated by a need for fast and efficient transportation of goods by means of containers (usually twenty or forty foot in length) in which cargo could be stowed and speedily handled and transported as a unit. The use of containers led to the design, building and employment of vessels specifically designed and intended to transport these containerized units, thus speeding the loading and discharge of cargo, minimizing the handling of individual packages or units and reducing the exposure to damage as a result. In conjunction with this streamlining, carrying vessels were more effectively utilized by virtue of faster turn-around time in port. Containerized cargoes are efficiently transferred from one mode of transportation to another which has generated the offering of a multimodal or comprehensive scheme of transportation with the resulting benefits to both container transportation operators and the cargo interests which utilize them.

In the decision below, the Court of Appeals for the Second Circuit disallowed the ocean carrier the benefit of its contractual limitation on the basis that the ocean carrier had erro-

neously stated the goods were on board the vessel, indicating that the ocean carrier, if it could not open the containers to count the cargo, at least had the duty to verify the weight of the containers at the vessel's side before they were loaded on board.

Aside from the fact that scales are not usually available shipside, even the requirement to weigh each container would destroy the effectiveness of container operation.

To weigh each individual container prior to loading of only 250 containers (20% of the forty foot carrying capacity of APL's largest container carrier) would involve some three and a half days of *straight through work* plus the attendant cost of labor which would necessarily be involved. It is not unusual for container vessels to spend no more than a day or two, *without overtime*, for turn-around time under present operations where containers are not weighed prior to loading on board.

Aside from the limited, if non-existent, availability of scales at shipside, to fasten such an obligation on a container operator in order for it to avoid the risk of being stripped of its contractual or statutory defenses would involve investments of astronomical proportion for the installation of scales, even if such were physically possible.

It is respectfully submitted that the reasoning of the Court below is neither commercially feasible nor practical. On the contrary, the ramifications of the obligation which the Court below would place upon container operators effectively would destroy the accepted scheme and purpose of container transportation.

To require the verification which the Court below speaks of would do away with the prompt and cost-efficient scheme which container transportation affords and can only have a serious negative impact on the commerce of the United States, which involves the importers and exporters who ship cargo as well as the container operators who carry that cargo.

Point II

The Decision Below Represents An Apparent Conflict Between The Circuits And Within The Second Circuit Itself

The Court below relied heavily on its prior decision in *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 27 F.2d 129 (2d Cir. 1928) *aff'd* after remand, 47 F.2d 878 (2d Cir.), *cert. denied*, 283 U.S. 856 (1931) which equated the facts considered by it to deviation or "quasi-deviation", regardless of what terminology may have been used. The Court in that case referred to deviation in the voyage or stowage of cargo on deck. It also went on to refer to *misdelivery* of goods as constituting essentially the same type of "breach".

Contrast that holding with the most recent decision by the Second Circuit in *B.M.A. Industries, Ltd. v. Nigerian Starline, Ltd.*, Nos. 85-7864, 7922, slip op. (2d Cir., March 19, 1986) where the Court, while considering the misdelivery of an entire cargo, allowed the ocean carrier the benefit of its package limitation. See also, *Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhauser*, 507 F.2d 68 (2d Cir. 1974) where the same Court allowed a package limitation, refusing to extend the principle of "quasi-deviation" in a case where the ocean carrier furnished an obviously unseaworthy ship.

In contrast to the approach by the Court of Appeals for the Second Circuit that deviation or "quasi-deviation" precludes the carrier from asserting its bill of lading defenses or the package limitation defense of COGSA, the Seventh Circuit in *Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt*, 313 F.2d 872 (7th Cir. 1963) had no difficulty in applying the clear meaning of the words of COGSA that "in any event" the carrier would be entitled to the package limitation unless a higher value was delcared, in spite of a deviation. See also the case of, *A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd.*, 199 F.2d 134 (4th Cir. 1952) where the Fourth Circuit held a carrier was not deprived of its right to exoneration under the fire provision of the Carriage of Goods by Sea Act even

though the cargo in question had been stowed on deck under clean bills of lading which the Court considered to be a "deviation".

The Court below also found support in its previous decision of *Elgie & Co. v. S.S. S.A. Nederburg*, 599 F.2d 1177 (2d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980) which involved a shipment outbound from the United States. Essentially, the decision below is the obverse of *Nederburg*, *supra*.

While the Court below acknowledged that the shipment in *Nederburg*, *supra,* was governed by the Pomerene Act, 49 U.S.C. § 81 et seq., which does not contain a limitation of liability provision, and pointed out that the Court in *Nederburg* referred to "established doctrines of admiralty law", the Court apparently overlooked the holding of this Court in *Leigh Ellis & Co. v. Davis*, 260 U.S. 682 (1923).

The suit in that case involved failure to deliver the full amount of cotton covered by two bills of lading. The District Court dismissed the matter on the ground that the suit was not timely under the provisions of the contract, and also on the merits, *Leigh Ellis & Co. v. Payne*, 274 Fed. 443 (N.D. Ga. 1921). The Circuit Court of Appeals affirmed the judgment, adopting the opinion below as to time bar, *Leigh Ellis & Co. v. Davis*, 276 Fed. 400 (5th Cir. 1921). The Federal Bills of Lading Act (the Pomerene Act) was applicable, *Leigh Ellis & Co. v. Payne*, 274 Fed. at 445.

The plaintiff in error asserted to this Court:

> "The suit here is not for a failure to deliver property received by a carrier, but for the wrong of the carrier in issuing a false bill of lading." *Leigh Ellis & Co. v. Davis, supra*, at page 685.

This Court upheld the contractual provision with respect to the commencement of suit time stating:

> "We find it unnecessary to consider other defenses besides the contract limitation, as we agree with the Courts below

that that disposes of the case." *Leigh Ellis & Co. v. Davis, supra*, at page 688.

See also, *Steven-Scott Grain Co. v. Chicago, R.I. & P. Ry. Co.*, 221 P. 1117 (Supreme Ct. of Kansas, 1924).

In *Leigh Ellis & Co. v. Davis, supra*, this Court enforced a contractual provision in spite of the assertion that the carrier had issued a false bill of lading. It is respectfully submitted that the decision below stands as contrary to this reasoning.

It may be one thing to preclude an ocean carrier from denying receipt or loading of cargo as stated in its bill of lading as an evidentiary matter. It is quite another to disregard the contract in its entirety.

With respect to the reservation in COGSA preserving the Pomerene Act, see the statement of A. B. Barber before the United States Senate Committee on Commerce, May 10, 1935, Hearing on Carriage of Goods by Sea, at page 27:

> "The Chairman: Is this bill in a sense substituted for the Pomerene Bill?
>
> "Mr. Barber: No, Sir it is not.
>
> "The Chairman: It supplements it?
>
> "Mr. Barber: Yes; it supplements it.
>
> "The Chairman: This bill does not seek to repeal the Pomerene Act?
>
> "Mr. Barber: No; it does not. We have to preserve the Pomerene Act in certain particulars, the most significant one being that the signature of the carrier that he has the goods is *conclusive evidence* of the receipt of the goods. Our proposed amendment would preserve the Pomerene Bills of Lading Act in that respect because very serious abuses had arisen before the enactment of the Pomerene Act, and those abuses would be permitted again, if that feature of the Pomerene Act were eliminated. So it is the purpose of our amendment to preserve the Pomerene Act in that particular." (Emphasis supplied.)

Point III

International Commercial Regimes Recognize The Viability of Defenses, Save In Cases Where The Carrier Acts With "Abandon"

> "Neither the Carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result." Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Feb. 23, 1968, 6 Benedict on Admiralty Doc. 1-2, 1-27.

Article 25 of the Warsaw Convention, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, applicable to international air carriage, contains a similar provision: "If the damage is caused by the carrier's willful misconduct" or by such default on his part as would be considered equivalent to willful misconduct he would not be entitled to the benefit of provisions excluding or limiting his liability.

The United Nations Convention on International Multimodal Transport of Goods, May 24, 1980, 6 Benedict on Admiralty, Doc. 1-4, at 1-58-82, contains a similar provision in Article 21. See also, Rule 17 of the Uniform Rules for a Combined Transport Document published by the International Chamber of Commerce, Doc. 298.

It is respectfully submitted that this approach is one of commercial practicality and reasonableness. Sanction is provided for only in the case of recklessness or willful misconduct, while the decision below far exceeds such a realistic and commerical approach.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals should be granted as prayed for.

Respectfully submitted,

MICHAEL J. RYAN
Attorney for *Amicus Curiae*
American President Lines, Ltd.
One World Trade Center
Suite 5215
New York, New York 10048
(212) 839-7000

CHRISTOPHER RALEIGH
HILL, BETTS & NASH
Of Counsel

MOTION FILED
MAY 2 5 1986

(4)

No. 85-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

S/S SALVADOR, her engines, lockers, etc., and
A/S IVARANS REDERI,

Petitioners,

—against—

BERISFORD METALS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF INTER-AMERICAN FREIGHT CONFERENCE

Wade S. Hooker, Jr.*
Stephen P. Sheehan
BURLINGHAM UNDERWOOD & LORD
One Battery Park Plaza
New York, New York 10004
(212) 422-7585
Counsel for Applicant
Inter-American Freight Conference

*Counsel of Record

29pp

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Applicant Inter-American Freight Conference (the IAFC) respectfully moves this Court for leave to file the accompanying Brief in this case as *amicus curiae*.

Consent to the filing of the accompanying Brief was obtained from Haight, Gardner, Poor & Havens, attorneys for the petitioners in this case. A letter dated April 30, 1986 was sent to McHugh & O'Conor, attorneys for the respondent, requesting consent to the filing an *amicus curiae* Brief on behalf of the IAFC. McHugh & O'Conor responded by letter dated April 30, 1986, refusing to consent.

The IAFC is a non-profit organization comprised of 21 ocean-going common carriers engaged in the transportation of cargo between ports on the United States Atlantic and Gulf Coasts and ports in Argentina, Brazil, Paraguay and Uraguay. The IAFC has the following interests in this case:

(1) Containerization of ocean shipping is promoted by IAFC member lines as a means of efficiently transporting goods. Unfortunately, this form of transportation has been placed in jeopardy by the Court of Appeals decision in this case, which would erect an impossible or unreasonable burden of re-weighing and probably also inspecting and analyzing the cargo within, simultaneously with the loading of the container on a vessel.

(2) The IAFC also has a special interest in this decision since it will hamper the growth of containerized intermodal shipments in the trade between the United States and Brazil and is in opposition to the Memorandum Agreement dated December 19, 1985 between the Governments of the United States and Brazil. Under that Agreement, each Government has pledged to refrain from interfering with the development of intermodal services within the territory of the other Government.

(3) The shipment to which the Court of Appeals decision relates is subject to an IAFC tariff on file with and regulated by the Federal Maritime Commission (FMC). This tariff has the force of law and limits liability for cargo damage or loss to $500 per package unless a greater value is declared and an *ad valorem* rate paid. The decision below is contrary to the plain meaning of this limitation and affords opportunities for shippers to seek favoritism in the settlement of cargo loss or damage claims. Such uncertainty and favoritism are contrary to the interests of the IAFC, as well as the FMC, in providing equal treatment to all shippers.

While the petitioners have raised the issue of limitation of liability in their Petition for Certiorari, they have not presented the inter-Governmental Memorandum Agreement or the IAFC tariff for the Court's consideration or discussed the conflict between these documents and the decision below. The IAFC's status as a representative of a large group of ocean-going common carriers affected by the Court of Appeals decision also adds authority and weight to the contention of the Petitioners, joined by the IAFC, that the decision disrupts industry-wide efficient cargo handling practices.

If this Court agrees with the position set forth in the accompanying Brief, the Court of Appeals decision should be reversed.

The IAFC therefore requests the Court grant it leave to file the accompanying Brief as *amicus curiae*.

Respectfully submitted,

Wade S. Hooker, Jr.*
Stephen P. Sheehan
BURLINGHAM UNDERWOOD & LORD
One Battery Park Plaza
New York, New York 10004
(212) 422-7585
Counsel for Applicant
Inter-American Freight Conference

Dated: May 23, 1986

* Counsel of Record

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* INTER-AMERICAN FREIGHT CONFERENCE

The Inter-American Freight Conference (the IAFC) as *amicus curiae* respectfully requests that this Court grant the Petition for Certiorari for the reasons set forth hereinafter.

INTERESTS OF INTER-AMERICAN FREIGHT CONFERENCE

The IAFC, as a non-profit organization comprised of 21 ocean-going common carriers engaged in trade between the United States and Central and South America, is opposed to impractical restrictions on containerization, particularly intermodal and house-to-house shipments, of which the decision

below is a grievous example, in that such restrictions discourage efficient carriage of cargo to the detriment of carriers and shippers alike.

As an international organization whose members carry cargo between the United States and Brazil the IAFC is interested in the fulfillment of the pledge by the Governments of the United States and Brazil not to interfere with the development of intermodal services within the territory of each other, and the decision below is contrary to this pledge.

The IAFC is charged by Shipping Act of 1984 and the Federal Maritime Commission (the FMC) with enforcing its tariff provisions and ensuring equal treatment of shippers by its member carriers, and is interested in the decision below being reversed because it requires carriers to act contrary to their tariff and discriminate in favor of certain shippers.

SUMMARY OF ARGUMENT

The Court of Appeals erred in holding that a carrier is liable for failure to load goods said to be stored in a locked container loaded on the vessel without benefit of the limitation of liability provisions of the bill of lading and the carrier's tariff with respect to these goods. The decision greatly interferes with industry-wide efficient container handling practices, contravenes an agreement between the Governments of the United States and Brazil, and is contrary to the tariff which binds the carrier and the shipper with the force of law.

ARGUMENT

I. In Discouraging Containerization, the Decision of the Court of Appeals is Contrary to the Interests of U.S. Commerce Generally, and to the Interests of the IAFC and the U.S. Government Specifically in Connection with the United States Brazil Trade, and the Decision Should Therefore be Reversed.

The introduction of containerization has revolutionized ocean transportation throughout the world. As one commentator has stated,

> Containerization is the modern contribution to the historic trend of diminishing transport costs and is therefore irresistible. It is by its repercussions outside technology much more than 'almost as profound a technological change in the carriage of general cargo as that from sail to steam'. The mechanisation and automation it implies will further decrease the burden of man's routine and controlling work, increasing safety and efficiency. Human intervention will become relatively sporadic, for pre-set targets will be executed by computers.

G. Van den Burg, *Containerization* 7 (rev. ed. 1975) (footnote omitted). By facilitating the movement of cargo and decreasing the cost of its handling, containerization benefits both shippers and carriers alike.

The United States, the birthplace of modern containerization (*id.* at 68), has continued to be at the forefront in expanding the use of containers. Of the 56.8 million long tons of cargo carried by liner services[1] in 1983, the last year for which comprehensive statistics are available, 39.9 million long tons

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1 Liner service refers to ocean cargo carriage pursuant to a definite, advertised schedule with relatively frequent sailings at regular intervals between specific U.S. ports or range of ports and designated foreign ports or range of ports. U.S. Maritime Administration, *United States Oceanborne Foreign Trade Routes* iii (June 1985).

were in containers, or 70 percent of all liner cargo. U.S. Maritime Administration ("Marad"), *United States Oceanborne Foreign Trade Routes* 3 (June 1985) (overall liner cargo); Marad, *Containerized Cargo Statistics Calendar Year 1983* 2 (July 1985) (containerized cargo). Moreover, containerized cargo trade increased by 83 percent over the period 1973-1983, whereas overall oceanborne liner service foreign trade increased a mere 10 percent over the same period. *Id.* at 2.

Some U.S. trade routes are almost wholly dependent upon containerized cargoes. For example, in 1983 the U.S.-Far East liner trade was 92 percent containerized. *Id.* at 4. While containerized cargo does not yet dominate the trade between the United States and South America, an increasingly greater share of the cargo carried by IAFC member lines is containerized. The port from which the shipment involved in the instant case originated (Santos, Brazil) in 1983 was the leading containerized port in South America, and twentieth overall for United States containerized foreign trade. *Id.* at 5 and 11.

The most efficient uses of containerization are in "house-to-house" and intermodal movements. In a house-to-house movement, the shipper packs and seals the container and delivers it into the control of a carrier or chain of carriers, who assume the responsibility of delivering the container to the receiver for unpacking by it. In an intermodal movement, one carrier (usually the ocean carrier) issues a through bill of lading covering not only the ocean movement but also the inland movements in the origin or destination country.

The decision below held the petitioners liable without limitation because the cargo in the containers loaded on board the vessel did not correspond to the bill of lading recitation. The petitioner carrier in this instance had stuffed the containers, but the decision below focused solely on petitioner's duty vis-a-vis cargo interests to load the vessel, stating that "when a carrier misrepresents its own conduct in loading goods aboard ship it is responsible for the misrepresentation and may not invoke contract provisions incorporating COGSA's limitations

on liability." *Berisford Metals Corp.* v. *S/S SALVADOR*, 779 F.2d 841, 849 (2d Cir. 1985).

This holding is equally applicable to house-to-house and intermodal carriage since in all examples the carrier is obligated to load the vessel and issue a bill of lading. Nor can a carrier avoid liability by refusing to issue an on-board bill of lading since if cargo received does not correspond to the quantity and weight recited in a "received for shipment" bill of lading the carrier would be liable under the Court of Appeals decision. It also extends logically to the kind of goods packed in a container. The insertion of a descriptive or qualifying term such as "said to contain" or "shipper's load and count" would not seem to protect a carrier in view of the warranty theory enunciated by the Court of Appeals as the basis for its decision.

The implications of holding carriers absolutely liable for bill of lading recitations of the contents of containers are staggering—merely denying the petitioners the package limitation here resulted in a fifteen-fold increase in liability, from $35,000 to $483,214.90. In house-to-house and intermodal carriage, where the ocean carrier never sees the container contents or at best sees them at an inland pickup point, carriers will simply refuse to include descriptions of the contents of containers in on-board bills of lading. This will seriously hinder international trade:

> The conventional 'order bill blank endorsed' embodies whatever merchandise it describes and this presents a convenient, and frequently essential, method of dealing with goods in the context of a letter of credit transaction. Where the document refers to a container and its contents . . . and the contents may include the goods of various shippers, it is extraordinarily difficult to sort out the rights of the parties . . . . In these circumstances, interim dealings with the goods and the normal use of shipping documents to refinance a transaction are difficult if not impossible.

Harfield, *Bank Credits and Acceptances* 65 (5th ed. 1974). Similarly, a carrier who actually stuffs the container will issue particularized bills of lading only on a "received-for-shipment" basis. This too will run contrary to financing requirements, since most letters of credit require marine bills of lading, which means an on-board bill of lading. International Chamber of Commerce, *Uniform Customs and Practice for Documentary Credits* Article 26.

The only alternative is the breakdown of containerized carriage at the point of loading, to permit weighing and unstuffing of the container simultaneously with the loading of the vessel and the issuance of the bill of lading. This would be a tremendous hindrance to U.S. foreign commerce, especially considering that a modern container vessel may carry more than four thousand containers, each of which may require one or more bills of lading and contain as many items as the container dimensions allow. The prospect of cargo inspection, weighing and issuance of bills of lading converging at dockside while the containers are being loaded on board the vessel is directly contrary to the basic efficiencies which containerization has come to represent.

Not only is this result contrary to the interests of U.S. foreign commerce generally, but it is also contrary to the interests of the IAFC and the U.S. Government with respect to the trade between the United States and Brazil. In the Memorandum Agreement dated December 19, 1985 between the U.S. Government and the Government of the Federative Republic of Brazil (a copy of which, certified by the Secretary of State, is attached hereto as Appendix A), both Governments made the following pledge:

> b) Within their respective territories, the parties may take such measures as they deem appropriate to promote the development of intermodal service and intermodal ratemaking. Neither party shall adopt or pursue measures which would interfere with development of intermodal rates and services within the territory of the other party.

The Court of Appeals decision would dishonor this pledge by inhibiting the development of intermodal service in this country and interfering with its development in Brazil.

II. The Court of Appeals Decision Should Be Reversed Because It Does Injustice To The Regulatory Framework Established By Congress and Administered by the Federal Maritime Commission and the IAFC.

General cargo shipping in United States foreign commerce is regulated under the Shipping Act of 1984, 46 U.S.C. app. 1701-20.[2] The IAFC operates within the purview of the FMC pursuant to an agreement (FMC No. 202-009648A) legalized under Section 6 of that Act. Under that Agreement, the IAFC establishes the rates and rules that govern the services offered by member carriers of the IAFC and publishes those rates and rules in tariffs filed with the FMC under Section 8 of the 1984 Act.

The shipment at issue in this case was governed by IAFC Section C Tariff FMC-20. This Tariff was required to be filed with the FMC under Section 18(b)(1) of the Shipping Act, 1916, 46 U.S.C. § 817(b)(1), as in effect in January 1984. Under Section 18(b)(3) of the 1916 Act, 46 U.S.C. § 817(b)(3), petitioner A/S Ivarans Rederi and the other members of the IAFC were required to adhere to the rates and rules prescribed in Tariff FMC-20. Shippers and consignees were also constrained to follow these tariff provisions under Section 16 of the 1916 Act, 46 U.S.C. § 815.[3]

---

2 At the time of the shipment in this case, the IAFC was regulated under the Shipping Act, 1916, 46 U.S.C. §§ 801-42. Ocean Shipping was removed from that Act when the Shipping Act of 1984 became effective. See 1984 Act, § 20(a)-(b), 98 Stat. 67, 88-89 (1984).

3 Effective June 18, 1984, authority for regulation of ocean shipping was removed from the Shipping Act, 1916, and re-enacted under the Shipping Act of 1984, which contains provisions imposing the same tariff requirements as those set forth above. See 1984 Act, §§ 8(a), 10(a)(1), 10(b)(1)-(4), 46 U.S.C. app. 1707(a), 1709(a)(1), 1709(b)(1)-(4).

Like all regulated transportation tariffs, Tariff FMC-20 is considered to have the force of law. As this Court stated in *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (citations omitted):

> Until changed, tariffs bind both carriers and shippers with the force of law. Under § 6 of the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property.

See also Gilbert Imported Hardwoods, Inc. v. 246 Packages of Guatambu Squares, 508 F.2d 1116, 1120-21 (5th Cir. 1975) (stating the same conclusion with respect to a tariff of the IAFC); *Compania Anonima Venezolana De Navegacion v. A.J. Perez Export Co.*, 303 F.2d 692, 696 n.12 (5th Cir.), *cert. denied*, 371 U.S. 942, 83 S.Ct. 321, 9 L.Ed.2d 276 (1962) (holding that a published tariff rate is not "a mere matter of contract" but becomes "a rate imposed by law"); *Atchison, T. & S.F. Ry. Co. v. City of Chicago*, 240 F.2d 930, 937 (7th Cir.), *aff'd*, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1957) (declaring that a tariff is to be treated the same as a statute).

Tariff FMC-20 provided clearly that the $500 per package limitation of liability for cargo damage or loss applied unless the shipper had declared a higher value and paid a 2 percent additional *ad valorem* rate:

> The liability of the carriers as to the value of the shipments at the rates provided herein shall be determined in accordance with the clause of the carriers' regular bill of lading form which presently limit carriers' liability to US$500.00 per package. Unless AD VALOREM rates are specifically provided for in individual rate items and the shipper desires to be covered for a value in excess of US$500.00 per package, the shipper must so stipulate in carriers' bill of lading covering such shipment. Such additional liability will only be assumed by the carriers at the request of the shipper and upon payment of an

> additional charge of two percent (2%) on the excess value declared over $500.00 per package; such AD VALOREM to apply in addition to the stipulated rate for the commodities shipped as specified herein.

See Appendix B containing a copy of Rule 12(b)1 of Tariff FMC-20, certified by the FMC to have been in effect in January 1984 and thus to have governed the shipment at issue in this case. The Court of Appeals decision dispensed with this limitation of liability despite the fact that the shipper had not declared a higher value or paid the *ad valorem* rate.

The divergence from the Tariff required by the decision below is far from *de minimus*. The Petitioners' liability under Tariff FMC-20 was $35,000. The Court of Appeals instructed the District Court to enter judgment against the petitioners for $483,214.90. In addition, the petitioners were deprived of *ad valorem* freight of approximately $9,000. The situation is certain to recur since the custom of the shipping industry is that carriers issue received-for-shipment or on-board bills of lading without opening sealed containers to check the identity and quantity of the goods, relying on shipper and consignee to do so. The decision below creates a strong monetary incentive for shippers and consignees to contend that short-delivered cargo was never put on board the vessel, or indeed participate in schemes to defraud the carrier by misrepresenting the contents of sealed containers, and claim for the full value of goods which may have never existed.

In contrast to the plain meaning of the limitation of liability in Tariff FMC-20, the decision below has introduced a high degree of uncertainty in connection with the limitation of liability. The decision is confusing as to both the theory of the recovery granted to the shipper and the extent of the supposed obligation of a carrier to investigate the shipment at the time of loading on board a vessel. Among other things, is a carrier obligated only to re-weigh the cargo, or must it open the container to confirm that its contents are exactly the same as that specified in the bill of lading?

Aside from its greater clarity, Tariff FMC-20 also comports with decisions in other circuits, where the novel conclusion of the Second Circuit is not followed. See, e.g., *Atlantic Mutual Insurance Co. v. Poseidan Schiffact*, 313 F.2d 872 (7th Cir. 1963). The policy of uniform treatment of shippers at the heart of the Shipping Acts does not permit carriers to extend more liberal coverage to cargo interests entitled to sue in the Second Circuit, even if it were possible to define this class with any certainty.

In the midst of the confusion created by the Court of Appeals decision, the opportunities for shippers to demand favoritism in the settlement of cargo loss or damage claims will be rampant. This is contrary to the policy of the FMC as well as the IAFC to require equal treatment for all shippers. Indeed, any such favoritism or other violation of a tariff provision may result in the imposition upon the shipper and carrier of civil penalties of up to $25,000 for each violation. See 1984 Act, § 13(a), 46 U.S.C. app. 1712(a). In addition, whenever requested by any of its member carriers, the IAFC has a duty to police and punish any member succumbing to such shipper demands or otherwise violating its tariffs. See 1984 Act, § 5(b)(4), 46 U.S.C. app. 1704(b)(4).

CONCLUSION

The Court of Appeals decision should be reversed since it is contrary to the interests of the United States, which favor the expansion of intermodalism and containerization in U.S. foreign commerce. The decision should also be reversed because it does injustice to the regulatory policy of equal treatment for the users of ocean transportation.

We therefore urge this Court to grant the Petition for Certiorari.

Respectfully submitted,

Wade S. Hooker, Jr.*
Stephen P. Sheehan
BURLINGHAM UNDERWOOD & LORD
One Battery Park Plaza
New York, New York 10004
(212) 422-7585

Counsel for Applicant
Inter-American Freight Conference

Dated: May 23, 1986

*Counsel of Record

APPENDICES

APPENDIX A

No. 86/5660

UNITED STATES OF AMERICA

[EMBLEM]

DEPARTMENT OF STATE

TO all to whom these presents shall come, Greeting:

I CERTIFY THAT the attached document is a true and complete copy, in English and Portuguese, of the original agreement between the United States and Brazil amending and extending the agreement of November 17, 1977, as amended and extended, relating to equal access to ocean carriage of government-controlled cargoes, signed at Rio de Janeiro December 19, 1985.

IN TESTIMONY WHEREOF, I, Michael H. Armacost, Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this ninth day of May, 1986.

[SEAL]

/s/ MICHAEL H. ARMACOST
Acting Secretary of State.

By /s/ ANNIE R. MADDUS
Authentication Officer, Department of State.

MEMORANDUM AGREEMENT

Representatives of the Government of the United States of America and the Government of the Federative Republic of Brazil have agreed as follows:

The parties' "Memorandum of Consultation" of March 7, 1970, as modified and extended through December 31, 1985 (the Agreement), is further extended through December 31, 1986, with the following modifications:

a) Within the territories of the parties, carriers serving the bilateral trade shall have the right to transship or relay cargo originating in the territory of one party and destined to the territory of the other party, subject to the cabotage laws of the parties. It is understood that the territory of the United States includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions.

b) Within their respective territories, the parties may take such measures as they deem appropriate to promote the development of intermodal service and intermodal ratemaking. Neither party shall adopt or pursue measures which would interfere with development of intermodal rates and services within the territory of the other party.

c) As of March 31, 1986, the tariffs of and shipping documents issued by non-vessel-operating common carriers organized under the laws of the United States shall be recognized and given effect in the southbound trade.

d) When the ocean freight portion of an intermodal shipment is identified in the appropriate shipping document, the Brazilian tax for the renewal of the merchant marine shall be applied only to such ocean portion.

e) The availability period used by SUNAMAM to determine whether waivers for the carriage of government-controlled cargo by non-national vessels may be granted shall consist of no more than three days before and seven days after the shipper's requested sailing date. SUNAMAM will respond to waiver requests within three working days of receipt.

f) National-flag carriers of the parties not now serving the bilateral trade are free to enter the trade, to carry coffee and cocoa, and to carry the parties' government-controlled cargo, consistent with the terms of the Agreement.

g) Each party agrees to provide to the other party regular and timely statistics specifying the value and tons of its government-controlled cargo in the bilateral trade.

h) The representatives of the Government of Brazil undertake and assure that all fiscal benefits granted by it, e.g., FINEX, BEFIEX, to its importers or exporters, shall be applied when U.S.-flag vessels are utilized, whether northbound or southbound, within the framework of this Agreement.

i) During the term of this Agreement, the parties will enter into negotiations concerning the operation of government cargo reservation as it affects carrier access to cargo moving in the bilateral trade.

This Agreement is reflected in the English and Portuguese languages, both texts being equally authentic.

Done at Rio de Janeiro, Brazil, on the 19th day of December, 1985.

FOR THE GOVERNMENT OF THE
FEDERATIVE REPUBLIC OF BRAZIL

/s/ MURILLO RUBENS HABBEMA DE MAIA
Murillo Rubens Habbema De Maia

National Superintendent of the
Merchant Marine (SUNAMAM)

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA

/s/ JOHN A. GAUGHAN
John A. Gaughan
Maritime Administrator

MEMORANDO DE ENTENDIMENTO

Os representantes do Governo dos Estados Unidos da America e do Governo da República Federativa do Brasil concordaram no seguinte:

O Memorando de Consulta entre as Partes, de 7 de março de 1970, modificado e sucessivamente prorrogado até 31 de dezembro de 1985 ("The Agreement"—O Acordo), é novamente prorrogado até 31 de dezembro de 1986, com as seguintes alterações:

a) As empresas servindo ao transporte maritimo bilateral terão o direito de transbordo ou transferência de carga originada no território de uma das Partes e destinada ao territorio da outra Parte, observadas as respectivas leis de Cabotagem. Entende-se como território dos Estados Unidos os seus diversos Estados, o Distrito de Columbia, a "Commonwealth" de Porto Rico, a "Commonwealth" das Ilhas Marianas do Norte e os demais territórios e possessões dos Estados Unidos.

b) Dentro de seus respectivos territórios, as Partes poderão adotar as medidas que julgarem apropriadas para promover o desenvolvimento do serviço intermodal e formação das respectivas tarifas de fretes. Nenhuma das duas Partes adotará ou promoverá medidas que possam interferir com o desenvolvimento dos serviços e tarifas intermodais no território da outra Parte.

c) Até 31 de maró de 1986, as tarifas e documentos de embarque emitidos por "Transitários não-armadores" (N.V.O.C.C.) constituídos dentro das leis dos Estados Unidos da America serão reconhecidos e aceitos no tráfego da importação brasileira.

d) Quando a parte da tarifa correspondente ao segmento oceânico de um transporte intermodal for identificada no documento de embarque apropriado, o Adicional

ao Frete para a Renovação da Marinha Mercante - AFRMM do Brasil será aplicado apenas a essa parte da tarifa.

e) Para determinar se os pedidos de liberação ("Waivers") de carga prescrita para navios não-nacionais poderão ser concedidos, a SUNAMAM considerará o período máximo de disponibilidade de navios-nacionais de três (3) dias ante e sete (7) dias depois da data de saída indicada pelo embarcador. A SUNAMAM responderá aos pedidos de liberação de carga dentro de três (3) dias úteis de seu recebimento.

f) As empresas de transporte marítimo de bandeira nacional não participantes atualmente do comércio bilateral poderão vir a participar do mesmo, transportando carga prescrita pelo Governo de cada Parte, bem como Café e Cacau, obedecendo os termos deste Acordo.

g) Cada uma das Partes concorda em encaminhar à outra, de forma regular e em tempo oportuno, estatísticas relativas à tonelagem e receita de fretes correspondentes à movimentação de carga prescrita no tráfego bilateral.

h) Os representantes do Governo do Brasil dão sua garantia de que tomarão medidas para que todos os benefícios fiscais, como por exemplo os do FINEX e BEFIEX, concedidos aos seus importadores ou exportadores, serão mantidos quando forem utilizados navios americanos, quer no sentido norte como no sentido sul, dentro do quadro deste Acordo.

i) Durante o período de validade deste Acordo, as Partes desenvolverão negociações relativas à operação de carga prescrita pelos governos, no que isso afeta o acesso dos transportadores à carga sendo movimentada no comércio bilateral.

Feito em dois exemplares, nos idiomas português e inglês, ambos os textos igualmente válidos.

Rio de Janeiro, 19 de Dezembro de 1985.

/s/ MURILLO RUBENS HABBEMA DE MAIA
Murillo Rubens Habbema De Maia
Superintendente Nacional Da
Marinha Mercante (SUNAMAM)

/s/ JOHN A. GAUGHAN
John A. Gaughan
Administrador Marítimo

APPENDIX B

UNITED STATES OF AMERICA

FEDERAL MARITIME COMMISSION

Washington, May 8, 1986

I HEREBY CERTIFY that the annexed are true copies of the official tariff records of 1st Rev. Page 54, and Original Page 55, to Interamerican Freight Conference Tariff FMC-20, in effect between January 1, 1984 and January 31, 1984, as they appear on file in the Federal Maritime Commission.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Federal Maritime Commission to be affixed, on the day and year first above written.

/s/ JOHN ROBERT EVEN

Secretary
Federal Maritime Commission

INTER-AMERICAN FREIGHT CONFERENCE - SECTION "C"		ORIG./REV.	PAGE
TARIFF Nº 3 (F.M.C. Nº20)		1ST./REV.	54
FROM: SOUTH BRASIL RANGE: SANTOS For other ports this range see pages 20/21 MID BRASIL RANGE: SALVADOR For other ports this range see page 22/23 NORTH BRASIL RANGE: BELEM For other ports this range see page 24/25	TO: U.S. ATLANTIC & GULF OF MEXICO PORTS.	CANCELS ORIGINAL	PAGE 54
		EFFECTIVE DATE JANUARY 1ST. 1982	
		CORRECTION: 39	

RULES AND REGULATIONS SECTION

RULE 12 AD VALOREM RATES

RULE 12(a) CURRENCY, SPECIE, GOLD OR SILVER BULLION AND NEGOTIABLE SECURITIES

Currency, Specie, Gold or Silver Bullion and Negotiable Securities will be carried at the following rates:

First US$25,000.00		1% on valuation
Over US$25,000.00.....	(R)	US$349.00 plus 1/2% AD VALOREM on excess valuation over US$25,000.00 up to and including US$100,000.00
Over US$100,000.00.....	(R)	US$872.50 plus 1/3% AD VALOREM on excess valuation over US$100,000.00
Minimum B/L.....	(R)	US$94.50.

Exception: 1/5% AD VALOREM on shipments of Gold Bullion in excess of US$1,000,000.00 valuation on one bill of lading.

(R) Reduction from General Rate Increase as per Special Supplement no. 1.

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INTER-AMERICAN FREIGHT CONFERENCE - SECTION "C"	ORIG./REV.	PAGE
TARIFF Nº 3 (F.M.C. Nº20)	ORIGINAL	55
FROM: SOUTH BRASIL RANGE: SANTOS For other ports this range see pages 20/21 MID BRASIL RANGE: SALVADOR For other ports this range see page 22/23 NORTH BRASIL RANGE: BELEM For other ports this range see page 24/25	CANCELS	PAGE
TO: U.S. ATLANTIC & GULF OF MEXICO PORTS.	EFFECTIVE DATE: JANUARY 1ST. 1982	
	CORRECTION:	

RULES AND REGULATIONS SECTION

RULE 12 AD VALOREM RATES (CONT'D)

RULE 12(b) LIABILITY OF THE CARRIERS

1. The liability of the carriers as to the value of shipments at the rates provided herein shall be determined in accordance with the clause of the carriers' regular bill of lading form which presently limit carriers' liability to US$500.00 per package. Unless AD VALOREM rates are specifically provided for in individual rate items and the shipper desires to be covered for a value in excess of US$500.00 per package, the shipper must so stipulate in carriers' bill of lading covering such shipment. Such additional liability will only be assumed by the carriers at the request of the shipper and upon payment of an additional charge of two percent (2%) on the excess value declared over US$500.00 per package; such AD VALOREM to apply in addition to the stipulated rate for the commodities shipped as specified herein.

2. Where tariff item specifies an ad valorem charge in addition to the base rate, or an ad valorem charge only, such ad valorem charge must be assessed whether or not shipper elects to show the value on the bill of lading. Value of merchandise must be established through sight of true copy of CACEX export permit (Guia de Exportação) as said term in Rule 2(g).

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MOTION FILED
MAY 23 1986

No. 85-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

S/S SALVADOR, her engines, boilers, etc., and
A/S IVARANS REDERI,

Petitioners,

—against—

BERISFORD METALS CORPORATION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF STAR SHIPPING A/S IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEROY S. CORSA
Attorney for AMICUS CURIAE
STAR SHIPPING A/S
40 Wall Street
New York, New York 10005
(212) 344-4700

SANDRA R.M. GLUCK
LENORE E. MCQUILLING
WALKER & CORSA
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ____

S/S SALVADOR, her engines, boilers, etc., and
A/S IVARANS REDERI,

Petitioners,

—against—

BERISFORD METALS CORPORATION,

Respondent.

MOTION OF STAR SHIPPING A/S FOR LEAVE TO FILE ANNEXED BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of the Supreme Court, Star Shipping A/S (hereinafter "Star" or "Amicus Curiae") hereby moves this Honorable Court for leave to file the annexed brief as *Amicus Curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. Consent to the filing of the brief was sought from, but not granted by respondent Berisford Metals Corporation.

Star is a Norwegian-based shipping organization which operates a fleet of over 40 vessels, the majority of which are designed for containers and unitized cargo. Star offers a multimodal liner service for containerized cargo between Japan and the United States and between Europe and the United

States. This service includes, in addition to ocean carriage, "microbridge" and "minibridge" transportation.[1]

Under this comprehensive transportation system, containerized cargo may be shipped overland from such points as Tokyo, Kobe or Nagoya (Japan) to be loaded aboard a Star vessel at Osaka or Yokohama; thence transported by sea to Tacoma, Washington and, finally, inland, by rail or truck, to any one of more than thirty-five U.S. cities. In its European trade, Star also provides a "feedering" service to transport containerized cargo by water aboard a "feeder" vessel for eventual shipment to the United States aboard a "mother" vessel operating out of such ports as Antwerp, Gothenburg and Le Verdon.

In the captioned proceeding, the Second Circuit Court of Appeals has ruled that an ocean carrier's liability for a bill of lading misrepresentation, however innocent, concerning the quantity or weight of cargo is to be that of an insurer. The $500 per package limitation of the ocean carrier's liability for damages, which by treaty and implementing statute[2] applies "in any event", is not to be applied in *this* event. To avoid imposition of insurer's liability in circumstances where an "on board" bill of lading is issued, ocean carriers must *at the very least* weigh every container at shipside *immediately* before it is loaded on board.[3]

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1 The term "microbridge" is used to describe an arrangement under which shipments are picked up from the shipper's premises and/or delivered directly to the consignee's premises or other inland points. "Minibridge" service provides for overland transportation from one port to another. (Thuong and Collison, *In Search of a Coherent Policy on International Intermodal Transportation*, 16 J. Mar. L. & Com. 397, n.1).

2 Section 4(5) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et seq*. (1936) implementing the "International Convention for the Unification of Certain Rules of Law Relating to (Ocean) Bills of Lading" (The Hague Rules), signed at Brussels on August 25, 1924, 51 Stat. 233, T.S. 931, 120 L.N.T.S. 155, 157, 183 (June 29, 1937).

3 The Court of Appeals acknowledged (but did not go so far as to agree with) defendants' argument that an ocean carrier cannot be

As a multimodal/container carrier, it is of vital interest to Star that this Honorable Court be apprised of the severely adverse impact which this decision will unquestionably have on the profitable use of containers for ocean carriage and on the continued development of an efficient, cost-effective multimodal transportation system. The tremendous savings which the "container revolution" has brought about in the form of reduced handling and labor costs, lower freight rates, increased protection against pilferage and damage to cargo, and greater profitability for vessels because of reduction of time spent in port[4] will simply be lost if the decision below stands. The decision can also be expected to critically interfere with the burgeoning development of multimodal container transportation, the great benefit of which, *inter alia*, is to reduce delivery time by permitting the transfer of containers from one mode to another with little delay for handling.[5]

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expected to open and tally the contents of each and every container (*Petition*, p. 16a). However, in light of the Court's most general statement that defendants were ". . . responsible for verifying the contents before loading the containers and issuing a clean onboard bill of lading" (*id.*), it does not appear that the Court intended to limit the duty of the carrier to weighing the container immediately prior to loading. *Amicus Curiae* believes that very few, *if any*, ports have scales available at shipside. If it had not been possible for defendants herein to have re-weighed the containers at the terminal gate, whether by reason of scale malfunction, terminal congestion or otherwise, defendants presumably *would* have been required to strip the containers in order to verify their contents.

4 Note, *Containerization and Intermodal Service in Ocean Shipping*, 21 Stan. L.R., 1077 (1969) at pp. 1087-88.

5 *Id.* at p. 1091. In the operation of *Amicus Curiae*, where, for example, the first "leg" of the carriage is by railroad, the container will *not* normally be weighed before being placed on the train. The container will be off-loaded from the train at the railhead inside the port container terminal and will be loaded aboard a Star vessel for ocean carriage without being weighed or opened. Under the holding of this case, the ocean carrier, to protect itself from insurer's liability for misrepresentation, must weigh or strip and tally each and every container upon receipt and before loading it on the vessel. This additional handling will *increase* the possibility of damage to or theft of the cargo. And if each container must be stripped, tallied and repacked because scales are not available, it will be *less* efficient to transport cargo in containers than break-bulk.

In declining to apply the unequivocal language of COGSA's § 4(5) "in any event" to the facts of the captioned proceeding, the Court of Appeals has not only deviated from the text of an international treaty; the Court has also fundamentally erred in failing to recognize that the issuance of a clean "on board" bill of lading for containerized cargo is a very different matter than the issuance of one for break-bulk cargo which can be loaded and tallied simultaneously. It is the purpose of *Amicus Curiae* to treat of the error in the decision below from the perspective of a participant in multimodal container transportation. *Amicus Curiae* respectfully submits that it is appropriate for this Court to consider the broader implications of a case which threatens to most seriously undermine developments in the very forefront of shipping technology.

Accordingly, *Amicus Curiae* respectfully requests leave to file the annexed brief.

Dated: New York, New York
May 22, 1986

Respectfully submitted,

/s/ LEROY S. CORSA

LeRoy S. Corsa
Attorney for *Amicus Curiae*
Star Shipping A/S
40 Wall Street
New York, New York 10005
(212) 344-4700

Sandra R.M. Gluck
Lenore E. McQuilling
WALKER & CORSA
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ____

S/S SALVADOR, her engines, boilers, etc., and
A/S IVARANS REDERI,

Petitioners,

—against—

BERISFORD METALS CORPORATION,

Respondent.

MOTION OF STAR SHIPPING A/S FOR LEAVE TO FILE ANNEXED BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Star Shipping A/S (hereinafter "Star" or "*Amicus Curiae*") operates a fleet of over 40 ocean-going vessels, offering a multimodal liner service for containerized cargo in the Far East, Europe and the United States. The multimodal aspect of Star's operation includes, in addition to ocean carriage, both "microbridge" and "minibridge" services.[1]

Amicus Curiae, together with *all* participants in the container/multimodal transportation system, have a vital interest

1 These terms are defined at p. 2, f.n. 1 of *Amicus Curiae*'s motion for leave to file this brief to which the Court is respectfully referred.

in the decision rendered by the Second Circuit Court of Appeals in the captioned proceeding. It is the purpose of this brief to apprise this Honorable Court of the far-reaching and highly adverse impact this decision can be expected to exert on the container/multimodal "revolution" which has been of such great benefit to shippers, shipowners and inland carriers alike.

ARGUMENT

POINT I

THE DEVELOPMENT AND SIGNIFICANCE OF CONTAINERIZATION AND MULTIMODAL TRANSPORTATION

The development and rapid growth of containerization[2] in the shipping industry has been described, with reason, as a "revolution" akin to the invention of the steam engine.[3] U.S. shippers and carriers have been active participants in this "revolution."[4]

The tremendous benefits of containerization accrue to shippers, inland carriers and ocean carriers. It has been estimated that placing goods in a container permits the shipper/exporter

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2 A container has been described as ". . . a permanent reusable article of transport equipment . . . durably made of metal, and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, stowage aboard ship, carriage, discharge from ship, movement and transfer of large number of packages simultaneously by mechanical means to minimize the cost and risks of manually processing each package." Simon, *The Law of Shipping Containers*, 5 J.Mar.L. & Com. 507, 513 (1974), cited by this Court in *Japan Lines* v. *County of Los Angeles*, 441 U.S. 434, 436, n.1 (1979).

3 Simon, *The Law of Shipping Containers*, *supra* at p. 507.

4 In 1982, there were two million containers in use worldwide, approximately half of which were U.S.-owned (Driscoll and Larsen, *The Convention on International Multimodal Transport of Goods*, 57 Tul. L. Rev. 183 at p. 198 (December, 1982).

to reduce packaging costs by more than one-third.[5] And because the packaging can be reduced, the *weight* of the shipment is similarly reduced so that the shipper pays less freight.[6] The packaging can be done in a fashion which secures even delicate cargo.[7] Finally, the shipper, by containerizing the cargo, provides substantial protection against pilferage.[8]

For ocean and inland carriers, the most obvious benefit of containerization is the reduction of handling costs. It has been estimated that stevedoring expenses for break-bulk cargo are in excess of five times the cost for similar containerized cargo.[9] For the ocean carrier, this reduction in stevedoring time is also significant because it permits the vessel to spend fewer days in port:

> An efficient container ship spends less than 25% of its time in port, compared to 60% for the conventional ship. Port fees are reduced, but more important, the ship is able to increase the number of voyages per year as well as its annual tonnage . . ."[10]

Most significantly, containerization is the basic building block of a multimodal transportation system:

> The theory of intermodal transport is based on the consolidation of several break-bulk units into a single interchangeable transportation unit that can be carried via a combination of several modes of transportation under a

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5 Note, *Containerization and Intermodal Service In Ocean Shipping*, 21 Stan.L.R. 1077 at pp. 1087-88 (1969).

6 *Id.*

7 This feature is most significant for those customers of *Amicus Curiae* who utilize the Star container service for shipment of electronics (from Japan) and wines and spirits (from Europe).

8 Note, *Containerization and Intermodal Service In Ocean Shipping, supra.*

9 *Id.*

10 *Id.* at p. 1088.

> single shipping document and a single freight charge from the shipper's warehouse to the consignee's warehouse. The container is the interchangeable transportation unit which it was hoped would prove to be the integrating element of an intermodal transportation system.[11]

As one commentator has noted, because multimodal transportation reduces and simplifies a shipper's export documentation, smaller shippers, who might otherwise be deterred from entering export trade because of the difficulties of contracting with several carriers and dealing with multiple bills of lading, are encouraged to ship their goods abroad.[12]

It is respectfully submitted that the decision of the Court below is essentially out-of-step with, and will seriously undermine the efforts of the U.S. shipping industry to develop an efficient and effective multimodal transportation system.

POINT II

MARINE BILLS OF LADING AND CONTAINER/ MULTIMODAL SHIPMENTS

In its undue emphasis on statements concerning quantity and weight in a marine bill of lading, the Court of Appeals failed to give *due* emphasis to the fact that a bill of lading, though issued on the form of the ocean carrier, is almost always prepared *by the shipper* (or his agent).[13] This fact assumes great significance for containerized cargo when it is considered

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11 Bissel, *The Operational Realities of Containerization and their Effect on the "Package" Limitation and the "On-Deck" Prohibition: Review and Suggestions*, 45 Tul. L. Rev. 902, 910 (1971).

12 Note, *Containerization and Intermodal Service In Ocean Shipping*, *supra*, at p. 1090.

13 This arrangement is implicitly recognized in COGSA's § 3(3) which requires the ocean carrier to *issue* a bill of lading containing information ". . . as furnished in writing by the shipper."

that containers are often packed and sealed by the shipper and so delivered to (or picked up by) the ocean carrier.

The decision of the Court below, holding an ocean carrier liable without benefit of the $500 per package limitation of liability for *any* misrepresentation concerning quantity or weight on the bill of lading, creates an absolutely unworkable situation for ocean carriers transporting containers whose contents they have never inspected. Whenever the shipper of a pre-packed and sealed container proffers to the ocean carrier a bill of lading and requests that it be "issued", the possibilities for "misrepresentation" are rife. To avoid becoming subject to insurer's liability for such misrepresentation, the carrier must open the container upon receipt, strip and tally its contents, and then repack the container, all the while risking that this increased handling will damage the goods; that they will not be repacked as the shipper intended; or that the goods may simply be stolen. It goes without saying that if the ocean carrier does what the Second Circuit Court of Appeals indicates it must do to protect its per package limitation, the effect would be to destroy *all* of the benefits conferred by containerization.

Can a carrier protect itself by simply weighing the container when the bill of lading details not only weight but also quantity (for example, the number of cartons or packages contained therein)? The decision of the Second Circuit Court of Appeals is most unclear.[14]

It is also possible that shipowners will attempt to simply delete all references to quantity and weight, in reliance on § 3(3)(c) of COGSA which provides, in relevant part:

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14 As noted at p. 3, f.n. 3 of the Motion of *Amicus Curiae* for leave to file this brief, the Court of Appeals' general statement that the shipowner must verify the contents of a container before issuing a bill of lading therefor indicating quantity and/or weight does *not* limit the carrier's responsibility to weighing. It is not clear what would have been the result in this case if the thieves had replaced the stolen ingots with a "cargo" of equal weight. The bill of lading would still have misrepresented the quantity of cargo (i.e. 100 bundles of tin ingots).

> That no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any . . . number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking. 46 U.S.C. § 1303(3)(c).

It is certainly questionable, however, whether mere receipt of a sealed container furnishes sufficient basis for suspecting that the shipper has not accurately represented the goods. And since the carrier can always open the container (however costly and risky that may be), *quaere* whether the carrier ". . . has had no reasonable means of checking" within the meaning of COGSA's § 3(3)(c). Finally, and most importantly, deletion of all information in the bill of lading concerning quantity and weight would likely not permit the bill to be negotiated. Why would a buyer agree to a documentary sales transaction if his document of title makes no reference to the quantity of goods he has purchased?

Nor is it likely that shipowners could avoid the drastic consequences of the decision below by inserting words in the bill of lading (in a situation where the container is packed and sealed by the shipper) such as "shipper's load, count and stow".[15]

The foregoing discussion demonstrates that, although the misrepresentation dealt with by the Court of Appeals in the captioned proceeding pertained to the "on board" statement on the bill of lading, there is no logical reason that the Court's decision would not also be applied to misrepresentations on "received for shipment" bills of lading. As a result, ocean

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15 Interestingly, the Pomerene Act, 49 U.S.C. §§ 81 *et seq.*, would appear to permit just such a reservation in the case of shipper-packed containers (49 U.S.C. § 101). The Pomerene Act only applies, however, to outbound shipments. As far as inbound shipments are concerned, the Second Circuit Court of Appeals has held that "shipper's load and count" reservations on a bill of lading, even for shipper-packed and sealed containers, are basically meaningless. *Westway Coffee Corp* v. *M/V NETUNO*, 675 F. 2d 30 (1982).

carriers will expose themselves to increased liability whenever they issue bills of lading containing particulars concerning quantity and weight for cargo which has been packed into containers by the shipper.

The only *certain* means by which an ocean carrier can preserve its per package limitation is to pack every container itself or to open, strip and tally every pre-packed container. In either event, containerization becomes a burden, not a benefit. And it is certainly not only—or even primarily—the ocean carrier that will suffer the consequences. It is the shipper's goods which will be subject to increased handling; and it is the shipper who will inevitably bear the increased costs which will necessarily be incurred if ocean carriers comply with the directive of the Second Circuit Court of Appeals in order to avoid insurer's liability.

Misrepresentations concerning "on board" bills of lading, with which the decision below is specifically concerned, constitute an obvious risk whether containers are stuffed by shippers or packed by ocean carriers. In either event, it is not only common but usual for containers to remain at the terminal for more than 24 hours between the time of receipt and the time of loading on board the vessel. As in the case at bar, they may not even be in the custody or control of the ocean carrier during that period of time.

The Second Circuit Court of Appeals has ruled that shipowners have a *minimum* duty to weigh containers at shipside immediately before loading. *Amicus Curiae* submits that there are few, *if any*, ports in the world which have facilities for weighing containers at shipside. As a result, containers will have to be transported back to the container terminal entrance (or wherever the terminal scales are located) prior to being loaded aboard ship. This might well require moving surrounding containers in order to isolate the container which is to be loaded. It is no exaggeration to say that such a procedure is so impractical and costly that ocean carriers simply will not do it. Rather, they will risk imposition of insurer's liability which will

then be passed on to shippers and consignees in the form of increased freight. It is the small shipper, for whom containerization and multimodal transportation has been a boon, who will bear the true burden of the decision in this case.

It is important to note that the ocean carrier may not refuse to make an "on board" representation on a bill of lading as he can with respect to the quantity or weight of the goods. Under COGSA's § 3(7):

> After the goods are loaded, the bill of lading to be issued by the carrier, master or agent of the carrier to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading . . . 46 U.S.C. § 1303(7).

An "on board" statement is also required for marine bills of lading under the *Uniform Customs and Practice for Documentary Credits*, I.C.C. Publication No. 400 (1983), Article 26 (a)(ii) and (c)(iii).[16] Nor can ocean carriers avoid an "on board" statement on a multimodal bill of lading by providing for "intended vessel."[17]

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16 As the Court of Appeals noted, an "on board" bill of lading is often required by the underlying sales agreement between shipper and consignee (*Petition*, p. 13a). In "FOB", "C.I.F." or "C&F" contracts, the risk of loss of or damage to the goods is transferred from seller to buyer at the ship's rail (*Guide to Incoterms*, I.C.C. Publication No. 320 [1979] pp. 22-28).

17 Article 26(c)(iii) of the *Uniform Customs and Practice for Documentary Credits, supra*, provides that banks will reject a document which: "contains the indication 'intended' or similar qualification in relation to the vessel and/or the port of loading unless such document bears an on board notation in accordance with Article 27(b) and also indicates the actual port of loading". However, if a documentary sales transaction does not require a *marine* bill of lading, Article 25 provides that banks may accept transport documents which indicate *either* "taking in charge" or "loading on board". Thus, the ocean carrier *must* issue an "on board" bill of lading for a multimodal shipment. The decision below, by imposing insurer's liability for "on board" misstatements, will inevitably force ocean carriers to increase their freight and therefore, reduce the competitive position of ocean carriers vis-a-vis other carriers who need not issue "on board" bills of lading.

The Court of Appeals' imposition on ocean carriers of liability without benefit of the $500 per package limitation for misstatements in "on board" or "received for shipment" bills of lading will be particularly onerous in a multimodal shipment situation. In the multimodal operations of *Amicus Curiae*, where pre-carriage is often by rail or barge, containers are usually not weighed before being placed on the railroad/barge. The containers are then off-loaded at the port container terminal where they remain for at least 24 hours before being loaded aboard a Star vessel. They are not customarily weighed at the container terminal either upon receipt from the railroad/barge[18] or immediately prior to being loaded. Bills of lading issued for the cargo are invariably prepared by the shipper's agent who is in the best position to furnish particulars concerning quantity and weight.

To comply with the decision in this case, Star and other carriers similarly situated would have to ensure, at the very least, that every port container terminal used by their vessels install weight scales at railheads and stringpieces in sufficient number that every container entering such terminal can be weighed upon entry *and* immediately prior to loading. Even if this were possible (and there is certainly no guarantee that port terminals the world over would agree), it would destroy all of the benefits of containerization/multimodal transport discussed earlier in this brief.

In 1980, multimodal transportation was the subject of a United Nations Convention which considered, *inter alia*, the specific problem of misrepresentations in multimodal transport documents.[19] Article 11 thereof provides that a carrier's lia-

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18 The procedure where pre-carriage is by truck is slightly different in that the truck normally will pass over weight scales located at the terminal gates, so that the weight of the containers being carried can easily be ascertained.

19 *Convention on International Multimodal Transport of Goods*, U.N. Doc. TD/MT/CONF/16(1980), reproduced in Driscoll and Larsen, *The Convention on International Multimodal Transport of Goods*, 57 Tul. L. Rev. 193 (December, 1982).

bility for false information in a multimodal transport document is to be without benefit of a per package limitation of liability *only* if the document is issued ". . . with intent to defraud". It is respectfully submitted that the Convention recognizes what the Second Circuit Court of Appeals in this case did not: that to penalize ocean carriers for innocent or negligent misstatements on bills of lading will undermine the continued development of multimodal/container transportation.

POINT III

THE DECISION BELOW IS IN CONFLICT WITH PAST AND CONTINUING EFFORTS BY CARRIERS AND SHIPPERS TO ACHIEVE A UNIFORM, SIMPLIFIED AND PREDICTABLE SET OF RULES TO GOVERN INTERNATIONAL TRANSPORTATION

The *Convention on International Multimodal Transport of Goods*, the *Uniform Rules for a Combined Transport Document*[20] and the *Uniform Customs and Practice for Documentary Credits*, *supra* all represent a substantial, continuing effort to streamline international commerce and transportation. This effort is not, however, of recent origin. The Hague Rules, implemented by the U.S. and other maritime nations, were designed to achieve the same end: the creation of a balanced and predictable transportation system.[21]

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20 I.C.C. Publication No. 298 (1975; reprinted 1980).

21 At Congressional hearings held in connection with the Hague Rules, the Chairman of the I.C.C. Bill of Lading Committee emphasized that ". . . the most important thing of all in international transportation [is] to draw the line with reasonable honesty, trying to do reasonable justice to all sides, but drawing the line at some place for all countries, so you could make some system possible. If the underwriter can insure, the banker knows his righs, the carrier knows his risks and can cover himself, you have a system. but when you have every nation with a

In failing to apply the clear words of COGSA's § 4(5) "in any event", the Court of Appeals has rejected the past and continuing efforts of the international shipping community to achieve uniformity. And in describing defendant's innocent misrepresentation as a "fundamental breach" depriving it of all defenses or limitations of liability in the contract of carriage, the Court has inappropriately interfered with the delicate balance, achieved by the Hague Rules, of the competing interests of shipper, carrier and consignee.[22]

A close reading of the decision below reveals that the Court of Appeals has treated an innocent or negligent misrepresentation in an ocean bill of lading as giving rise to a cause of action

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different law and every carrier with a different bill of lading, you have absolute chaos." *Hearings before the Committee on the Merchant Marine and Fisheries*, House of Representatives, 68th Congress, 2d Session, January 28/29, 1925.

This sentiment was echoed by the Secretary of State in 1936 when he urged Congress to implement the Hague Rules without amendment: "The uniformity in the laws of all maritime nations which it is sought to advance by the adoption of the international rules concerning bills of lading for the carriage of goods by sea as embraced in the convention will be unattained, to the extent to which the provisions of laws enacted by the U.S. or by other countries differ in detail from the international rules." *Report from Committee of Merchant Marine and Fisheries*, Report No. 2218, 74th Congress, 2d Session (1936).

22 It is noteworthy that the doctrine of "fundamental breach" as a rule of law ousting exculpatory or liquidated damages provisions in contracts (which, at one time, was embraced by the English Court of Appeals) has been severely criticized and was ultimately rejected by the House of Lords (*Suisse Atlantique Societe D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] A.C. 361 (1966); *Photo Production Ltd.* v. *Securior* [1980] 1 All E.R. 556). See, also, Coote, *The Second Rise and Fall of Fundamental Breach*, 55 Australian Law L.J. 788.

In *Photo Production, Ltd.* v. *Securior*, the House of Lords was particularly influenced by the passage of the Unfair Contract Terms Act of 1977 by which the English Parliament regulated the use of exculpatory clauses in certain types of standard form contracts. *Amicus Curiae* submits that the adoption of the Hague Rules by the world community similarly removed the need for the judicial interventionism which the opinion below represents.

that is, in essence, separate from, or alternative to an ordinary breach of contract cause of action.[23]

The Court of Appeals' analysis appears to be a sequel to its decision in *Elgie & Co.* v. *S.S. S.A. NEDERBURG,* 599 F. 2d 1177 (1979), *cert. denied* 444 U.S. 1072 (1980). In *Elgie & Co.,* which involved a shipment from the United States, the Court "applied" § 22 of the Pomerene Act, 49 U.S.C. §§ 81 *et seq.* and held that the carrier could not limit its liability for a misrepresentation in the bill of lading because the Pomerene Act does not contain limitation of liability provisions. As the Court acknowledged in its decision in the case at bar (*Petition*, p. 17(a), f.n. 4), the bill of lading in *Elgie & Co.* provided for the application of COGSA to the entire period of time that the goods were in the carrier's custody. Thus, in *Elgie & Co.*, the Court of Appeals implicitly held that § 22 of the Pomerene Act creates a separate cause of action to which COGSA defenses and the $500 per package limitation of liability do not apply.

Amicus Curiae submits that *Elgie & Co.* was wrongly decided and that the decision in the case at bar is similarly in error. Section 22 of the Pomerene Act was enacted in response to the line of authority, beginning with the English decision of *Grant* v. *Norway,* 10 C.B. 665, 138 Eng. Rep. 263 (C.P. 1851), holding that a carrier could not be liable for non-receipt of cargo to a third-party who had relied upon a false representation in a bill of lading that the cargo had been loaded. These decisions[24] proceeded on the theory that the issuer of the bill of lading only had authority to issue bills of lading for goods actually loaded on board the vessel and could not bind the vessel owner by false representations. As a result of the enactment of § 22 of the Pomerene Act, a carrier was estopped

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23 See, for example, the Court's statement that plaintiff's suit ". . . is not based on the theft of the ingots or on Ivarans' negligence but on the carrier's false representation that it loaded the 70 containers [sic] on its ship." (*Petition*, p. 17a).

24 For U.S. decisions, see *Schooner Freeman* v. *Buckingham*, 59 U.S. (18 How.) 182 (1855); *The Lady Franklin*, 75 U.S. (8 Wall.) 325 (1868); *Pollard* v. *Vinton*, 105 U.S. 7 (1881).

from arguing that a bill of lading was issued without its authority in these circumstances, *Portland Fish Company* v. *States Steamship Company*, 510 F.2d 628, at p. 632 (9th Cir. 1974). See, generally, Murray, *History and Development of the Bill of Lading*, 37 U. of Miami L.R. 689.

There is nothing in the legislative history of the Pomerene Act or COGSA which justifies the *Elgie & Co.* holding that a bill of lading misstatement gives rise to a cause of action which is to be adjudicated without reference to the other terms of the contract of carriage. *At most,* application of the principle codified by § 22 of the Pomerene Act gives rise to an estoppel which precludes the carrier from denying (as against a holder who was relied thereon) the receipt of cargo as described in the bill of lading. *Portland Fish Company* v. *States Steamship Company, supra.*[25]

The Court of Appeals' treatment of bill of lading misrepresentations is in conflict with the basic goal of multimodal transportation to establish a single contract between the shipper and multimodal carrier which can be enforced in accordance with agreed upon principles of contractual liability. Carving out a "misrepresentation" cause of action, but only for quantity and weight on ocean bills of lading, cannot possibly be reconciled with the creation of a uniform, multimodal contract of carriage.

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25 Significantly, the Court of Appeals in *Portland Fish*, in response to applications by ocean carriers to file briefs *amicus curiae* concerning the effects of this decision on containerization, stated: "Since the case before us involves solely a bulk shipment subject to piece count, the questions thus raised will have to wait another day for decision. We intimate no opinion on them." 510 F.2d at p. 634. *Amicus Curiae* respectfully suggests that the "answer" can be found in § 21 of the Pomerene Act (49 U.S.C. § 101) which relieves a carrier from liability for non-receipt of cargo loaded by a shipper.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* prays that a writ of certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

LEROY S. CORSA
Attorney for AMICUS CURIAE
STAR SHIPPING A/S
40 Wall Street
New York, New York 10005
(212) 344-4700

SANDRA R.M. GLUCK
LENORE E. MCQUILLING
WALKER & CORSA
Of Counsel